95-1662

No.

Supreme Court, U.S.
FILED
APR 15 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY, AFL-CIO; and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioners,

v.

JANET RENO, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

APPENDIX A — Page

United States Court of Appeals for the District of Columbia Circuit, Opinion, January 16, 1996 [reported at 73 F.3d 1134] 1a

APPENDIX B

United States District Court for the District of Columbia, Memorandum Opinion, June 24, 1994 [unreported] 24a

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit, Opinion, December 22, 1992 [reported at 981 F.2d 1269] 38a

APPENDIX D

United States District Court for the District of Columbia, Memorandum Opinion, August 7, 1991 [reported at 768 F.Supp. 375] 50a

APPENDIX E

Outer Continental Shelf Lands Act of 1953, as amended

43 U.S.C. § 1331 ..... 65a
43 U.S.C. § 1332 ..... 65a
43 U.S.C. § 1333 ..... 65a
43 U.S.C. § 1356 ..... 66a

APPENDIX F

Coast Guard Regulations

33 C.F.R. §§ 141.1-141.20 (1991) 69a

APPENDIX G

Immigration and Nationality Act

8 U.S.C. § 1182 ..... 75a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 26, 1995 Decided January 16, 1996

No. 94-5256

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY, AFL-CIO, and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

APPELLANTS

v.

JANET RENO, UNITED STATES ATTORNEY GENERAL, *ET AL.*,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(90cv02342)

Before: EDWARDS, *Chief Judge*, WALD and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Chief Judge* EDWARDS.

RANDOLPH, *Circuit Judge*: This case returns to us after proceedings on remand pursuant to our decision in *United Association of Journeymen v. Barr*, 981 F.2d 1269 (D.C. Cir. 1992). As in the first appeal, the principal question is whether aliens, operating from a

foreign-owned derrick barge on the outer Continental Shelf, may construct oil platforms for domestic companies without complying with United States immigration laws.

I

Submerged lands on the outer Continental Shelf lying three miles seaward of, and beyond, each State's coastline generally "appertain" to the United States and hence may be subjected to federal jurisdiction and control. 981 F.2d at 1270. In order to encourage the discovery and development of oil reserves in the region, Congress enacted the Outer Continental Shelf Lands Act of 1953 (the OCSL Act), ch. 345, 67 Stat. 462 (codified as amended, 43 U.S.C. § 1331 *et seq.*). In its original form, § 1333(a)(1)—one of the provisions with which we are concerned here—"extended' the Constitution and laws of the United States, "to all artificial islands and fixed structures" erected for the development of natural resources. § 4, 67 Stat. 462. In 1978 Congress amended § 1333(a)(1), deleting the phrase "fixed structures" and replacing it with "all installations and other devices permanently or temporarily attached to the seabed." OCSL Act Amendments of 1978, Pub. L. No. 95-372, § 203, 92 Stat. 629, 635.

The extent to which § 1331(a)(1), as amended, rendered aliens working on the outer Continental Shelf subject to the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, might depend, we said in our first opinion, on another provision of the OCSL Act also added in 1978 —43 U.S.C. § 1356, § 208, 92 Stat. 669. 981 F.2d at 1273-74. Section 1356 required the Coast Guard to issue rules requiring that "any vessel, rig, platform, or other vehicle or structure" used in regulated operations on the outer Continental Shelf be "manned or crewed . . . by citizens of the United States or aliens lawfully admitted to the United States for permanent residence." 43 U.S.C. § 1356(a) & (a)(3). To this nationality requirement,

§ 1356(c) made three exceptions pertinent to this case. Americans would not have to man or crew any vessel, rig, platform, or structure "over 50 percent of which is owned by citizens of a foreign nation or with respect to which the citizens of a foreign nation have the right effectively to control." 43 U.S.C. § 1356(c)(2). Nor would American crews be necessary if "there are not a sufficient number of citizens of the United States, or aliens lawfully admitted to the United States for permanent residence, qualified and available for such work" (43 U.S.C. § 1356(c)(1)(B)); or if "the President makes a specific finding, with respect to the particular vessel, rig, platform, or other vehicle or structure, that application would not be consistent with the national interest." 43 U.S.C. § 1356(c)(1)(B).

The events precipitating this lawsuit occurred in 1989, when Heerema Marine Contractors, S.A., a Dutch-owned Swiss company employing nonimmigrant aliens, performed construction work for Exxon Company, U.S.A., on the outer Continental Shelf off the coast of Santa Barbara, California. Heerema installed platform "jackets"—that is, pre-manufactured steel legs and infrastructure—to serve as the foundations for two Exxon oil platforms. Heerema transported the jackets to the outer Continental Shelf and then secured them to the seabed, working from the BALDER, a semisubmersible derrick barge owned by a Heerema affiliate. The BALDER's crew consisted of aliens. Exxon owned the jackets, but Heerema had custody and control of the jackets during the installation stage.

Two labor unions representing American construction workers sued the Attorney General, the Secretary of State, the Secretary of Transportation, the United States Coast Guard, and the Immigration and Naturalization Service. Citing § 1333(a)(1) of the OCSL Act, as amended, the unions claimed that the immigration laws barred alien employees from installing oil platforms on the outer Con-

tinental Shelf without first obtaining the appropriate immigration visas.

Under the current version of the Immigration and Nationality Act, a nonimmigrant alien may temporarily enter the United States to perform construction work if he possesses an H-2B visa. Before a consular officer may issue an H-2B visa, the employer petitioning for the alien's admission must obtain "certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers." 8 C.F.R. § 214.2(h)(6)(iv)(1); *see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b); *Kooritzky v. Reich,* 17 F.3d 1509 (D.C. Cir. 1994).

In the first appeal we vacated the district court's judgment in favor of the unions. The court had ruled that the immigration laws applied to the alien workers as a result of § 1331(a), the general provision extending the laws of the United States to the outer Continental Shelf. *United Ass'n of Journeymen v. Thornburgh,* 768 F. Supp. 375 (D.D.C. 1991). We directed the court to determine—in light of evidence regarding the construction of oil platforms and in light of the Coast Guard's interpretation of its regulations—whether the foreign ownership exception in § 1356(c)(2) applied to vessels like the BALDER. 981 F.2d at 1274. In a thorough and well-reasoned opinion, the district court found that workers on derrick barges engaged in installing oil platforms are, under the Coast Guard's regulations, manning and crewing the foreign-owned vessel rather than the domestically-owned platform, and therefore fall within the § 1356(c)(2) exemption. The court further ruled that the immigration laws do "not govern non-immigrant alien construction workers who are covered by the exceptions to the manning and crewing requirements found in § 1356

of the OCSL Act." *United Ass'n of Journeymen v. Reno*, Civ. Action No. 90-2342, slip op. at 27 (D.D.C. June 24, 1994).

II

One of the principal issues raised in the first appeal and decided on remand is no longer in controversy. The unions do not now dispute what the district court identified as the Coast Guard's "continuous and long-standing" view —namely, that aliens such as those on the derrick barge BALDER were manning and crewing the barge rather than the oil platform, and were thus within the terms of § 1356(c)(2). Slip op. at 21-23.

Although the issue is uncontested, it is important to give a correct depiction of the facts relating to it. It is not, for instance, accurate to say that all the work needed to install an offshore oil platform is done on the platform and that "there is no construction work being performed on the barge" (Dissent at 2). For one thing crane operators and riggers remain on the barge throughout the installation phase. The district court so found. Slip op. at 17. For another thing, considerable work must be done before the oil platform is affixed to the ocean floor. That work is necessarily done from the derrick barge. The two main components of an oil platform are the "jacket" or base and the deck sections of the platform. It is only after the jacket is secured and the deck sections are welded onto the jacket, that workers operate mainly from the platform to complete the installation. Installation can take as little as two weeks and as long as seven months. The work may involve as many as 200 people engaged in welding, rigging, piledriving, steamfitting, pipefitting, painting, plumbing, and electrical work. During this final phase, most of the workers sleep and eat on the barge but perform no work there. *Id.* When installation is complete, the workers are transported back to land by boat

or helicopter [1] and the barge departs with a skeleton crew.

This method of operation did not, the district court found, take the workers out of § 1356(c)(2). As used in § 1356(a)(3), "manned or crewed" refers—according to the Coast Guard's regulations (33 C.F.R. § 141.15(a)) —to the "regular complements of the unit." There is nothing "absurd" or "ridiculous" about the Coast Guard's view (Dissent at 1, 2) and, as we have said, it is unchallenged on appeal. The " 'regular complement of the unit' means those personnel necessary for the routine functioning of the unit." 33 C.F.R. § 141.15(b). As a Coast Guard Commander explained, construction workers on derrick barges, "are engaged in the business of the vessel, which is constructing offshore platforms; therefore, construction workers would be the crew members or be part of the complement of the vessel." In statutory terms, foreign-owned derrick barges are thus exempt from § 1356 (a)(3)'s requirement that any vessel, rig, platform or structure used in regulated operations on the outer Continental Shelf be "manned or crewed . . . by citizens of the United States or aliens lawfully admitted to the United States for permanent residence."

This brings us to the critical question: although foreign-owned derrick barges and their workforces operating on the outer Continental Shelf fit within the exception of § 1356(c)(2), and thus do not have to be manned or crewed by American citizens or resident aliens, must the aliens working on them nevertheless comply with the

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[1] This is doubtless why, despite the view of the Immigration and Naturalization Service that the immigration laws do not apply on the outer Continental Shelf, alien workers on the BALDER held B-1 visas. This type of visa is available to a nonimmigrant alien who is "visiting the United States temporarily for business or temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B). ("Business" does not include construction work. 8 C.F.R. § 214.2(b)(5).) *See United Ass'n of Journeymen v. Barr*, 981 F.2d at 1272 n.2.

strict requirements of the Immigration and Nationality Act?

Insisting that these workers must obtain visas, the unions start from the premise that the OCSL Act's original extension of federal law to the outer Continental Shelf rendered the Immigration and Nationality Act applicable to aliens working from a derrick barge.[2] Our dissenting colleague embraces the same idea. Dissent at 3-4, 9. Whether the 1953 version of the OCSL Act accomplished as much is far from certain. We may be certain, however, that before 1978, the immigration laws were never applied to workers on oil platforms on the outer Continental Shelf. This was apparently because the platforms were not considered permanent, a condition some thought necessary under the original § 1333(a)(1), which had extended federal law to "fixed structures." *See* Memorandum Opinion for the General Counsel, Immigration and Naturalization Service, 3 Op. Off. Legal Counsel 362, 362-63 (1979). Given that view of the statute, it would certainly have followed that derrick barges used to build the platforms were not covered either. And so a quarter of a century after passage of the OCSL Act, the govern-

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[2] Our first opinion explained why, in the absence of such an extension, the immigration laws would not apply to the outer Continental Shelf: nonimmigrant aliens arriving there would not be entering the United States. 981 F.2d at 1271 n.1. "Entry" is a term of art in the immigration laws. *See, e.g., Rosenberg v. Fleuti*, 374 U.S. 449 (1963); 1 CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE § 11.01, at 11-1 (1995). The Immigration and Nationality Act defines "entry" to mean "any coming of an alien into the United States, from a foreign port or place. . . ." 8 U.S.C. § 1101(a)(13). " 'United States' . . . when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. § 1101(a)(38). The term "continental United States" is defined as follows: "Whenever the phrase 'continental United States' is used in any law of the United States enacted after the date of enactment of this Act [June 25, 1959], it shall mean the 49 States on the North American Continent and the District of Columbia, unless otherwise provided." 1 U.S.C. § 1 note.

ment could report that "no attempt has ever been made to enforce immigration laws on the Outer Continental Shelf." *Oversight on the Outer Continental Shelf Lands Act Amendments of 1978: Hearings Before the House Select Comm. on the Outer Continental Shelf*, 96th Cong., 1st Sess. 182 (1980) (testimony of Deputy General Counsel Paul Schmidt, Immigration and Naturalization Service), *quoted in* H.R. REP. No. 1214, 96th Cong., 2d Sess. 48 (1980).

The current § 1333(a)(1) is not as limited as the pre-1978 version. As amended in 1978, the statute now extends federal law to any installation or other device permanently *or* temporarily attached to the seabed.[3] If we looked only to § 1333(a)(1), the union's case would be a strong one.

The question therefore narrows to the effect of another 1978 amendment to the OCSL Act—the addition of § 1356, and particularly the foreign ownership provision in § 1356(c)(2). The unions deem this statute unimportant. They point out that the foreign ownership provision is not framed as an exception to the extension of federal laws (including the immigration laws) to the outer Continental Shelf. By its terms, § 1356(c)(2) simply creates an exemption from § 1356(a)(3)'s require-

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[3] 43 U.S.C. § 1333(a) now provides:

> The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

ment that every "vessel, rig, platform, or other vehicle or structure" have a crew consisting of citizens and resident aliens. While a vessel like the BALDER may thereby escape the manning and crewing strictures of § 1356 (a)(3), the unions believe its crew members would remain subject to the Immigration and Nationality Act, about which § 1356 is silent.

The unions' argument is plausible but not cogent and we think the district court rightly rejected it. Section 1356 may be read as the unions read it, yet it may also be read as the Justice Department and the State Department have read it since its enactment nearly two decades ago. To say that no vessel or structure may have a crew of noncitizens or nonresident aliens unless it is foreign-owned, is to say—or at least, to suggest, rather strongly—that foreign-owned vessels and structures may have such crews. Sixteen years ago, when the ink was scarcely dry on the OCSL Act amendments, the Justice Department carefully studied this issue at the request of the Immigration and Naturalization Service. The Justice Department concluded that § 1356 is "a self-contained statement of the extent to which principles of immigration control are to be applied": if the crew of a foreign-owned vessel or structure need not consist of citizens or resident aliens, the Immigration and Nationality Act imposes no further restrictions. 3 Op. Off. Legal Counsel at 366. This contemporaneous interpretation by the agency of government responsible for administering the immigration laws deserves considerable respect, not only because of the Justice Department's responsibilities and expertise, but also because the reasons supporting its conclusion are compelling. *See, e.g., NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995); *National Ass'n of Regulatory Util. Comm'rs v. SEC*, 63 F.3d 1123, 1126 (D.C. Cir. 1995).[4]

[4] The dissent finds "significant" several post-enactment statements in a House committee report attesting to the personal

Foremost among those reasons is that applying the Immigration and Nationality Act despite § 1356 would be treating that provision, and the exceptions written in it, as nonsensical. Consider § 1356(c)(1)(A). This states that if a contract in effect before September 1978 (the date of the amendments) required manning by aliens, the vessel or structure could continue to be so manned. The evident purpose was to "avoid any disruptions in O[uter] C[ontinental] S[helf] activities." H.R. REP No. 590, *supra,* at 176, 1978 U.S.C.C.A.N. at 1582; H.R. CONF. REP. No. 1474, 96th Cong., 2d Sess. 124, *reprinted in* 1978 U.S.C.C.A.N. 1674, 1723. Yet if one accepted the unions' position and the position of our dissenting colleague, disruptions would have been inevitable: despite § 1356(c)(1)(A), the general immigration law would have forced the owners of each vessel and structure covered by such contracts to replace their crews with American citizens and resident aliens (assuming qualified domestic workers were available). The exemption granted in § 1356(c)(1)(A) would then, through the interpretation of the unions and of the dissent, be rendered essentially worthless.

The last clause of § 1356(c)(2) would also be drained of meaning if we adopted the unions' and the dissent's view. Whenever a foreign government imposes its own

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opinions of the committee's chairman about what he believed the 1978 amendments had accomplished. Dissent at 7-8. It is bad enough to interpret a statute on the basis of what a later Congress says about it. *See United States v. Price,* 361 U.S. 304, 313 (1960). It is far worse to rely on the views—not of a later Congress—but of a few members of a later Congress. During this committee's oversight hearing, a Justice Department representative, confronted with statements similar to those contained in the dissent, gave the proper response. The statements merely serve, he said, as "an example of why you really cannot use the personal and anecdotal experience of someone in the legislative process as part of statutory interpretation." *Oversight on the Outer Continental Shelf Lands Act Amendments of 1978, supra,* at 177 (testimony of Jack M. Goldklang).

national manning requirements for the development of its offshore oil and gas, § 1356(c)(2) permits the President to respond by revoking the exemption for vessels and structures owned by citizens of that foreign nation. But if the unions and the dissent were right, the President's removal of the exemption would amount to an empty gesture: for all practical purposes, the Immigration and Nationality Act already would have forced the foreign owners to employ American crews on their vessels and structures. Much the same may be said of § 1356(c)(1)(C), which allows the President to exempt even American-owned vessels and structures from the manning and crewing requirement if this would be in the national interest. Through these provisions and through § 1356 in general, Congress sought to "reconcile the dual concerns of providing the fullest employment for Americans in U.S. [O]uter [C]ontinental [S]helf activities and eliminating to the fullest possible extent the likelihood of retaliation by foreign nations against American workers in foreign offshore activities." H.R. CONF. REP. No. 1474, *supra*, at 123, 1978 U.S.C.C.A.N. at 1722. The district court put the point succinctly: "If alien workers on the O[uter] C[ontinental] S[helf] were subject to both § 1356 and the [Immigration and Nationality Act], the scales would invariably tip in favor of the first concern, thereby disrupting the balance of interests Congress hoped to create." Slip op. at 27.

This conclusion gains further support from § 1356(c)(1)(B), a provision exempting units from the manning and crewing requirements when there are insufficient citizens and permanent residents qualified and available to perform the necessary work. The conference report observed, correctly, that this exception incorporates "virtually the present standard of the immigration law." H.R. CONF. REP. No. 1474, *supra*, at 124, 1978 U.S.C.C.A.N. at 1723. "Implicit in that statement, however, appear[s] to be the assumption that an exception, independent of

the immigration laws, is being created." 3 Op. Off. Legal Counsel at 367.

It is true that the union's interpretation would not deprive § 1356 of all meaning: § 1356 would still operate with respect to free floating vessels, which are not covered by § 1333(a)(1) (it extends federal law to the seabed and artificial islands and installations permanently or temporarily attached to the seabed). But that is not exactly a point in the unions' favor. To say that § 1356 would have some residual effect in one limited area, is to admit that the statute is being stripped of any effect everywhere else. Section 1356 applies to "any . . . rig, platform, or other . . . structure," not just to "vessels." If, as the unions suppose, the immigration laws govern the use of nonimmigrant workers on the outer Continental Shelf despite § 1356, then Congress acted nonsensically in subjecting such installations and anchored vessels to the regulatory system, and the exceptions, set forth in § 1356. It is, in short, not enough that the union's position allows one portion of § 1356(c)(2) to survive, the portion, that is, dealing with free-floating vessels. The statute should be read so that all of it has effect—so that, in other words, the exemption for foreign-owned derrick barges is meaningful. *See, e.g., Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995); *Railway Labor Executives' Ass'n v. National Mediation Bd.*, 29 F.3d 655, 665 (D.C. Cir.) (in banc), *amended*, 38 F.3d 1224 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1392 (1995); *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

It is not accurate to describe, as the unions do, the district court's reading of the OCSL Act as a partial repeal of § 1333(a)(1). *See Morton v. Mancari*, 417 U.S. 535, 549 (1974). Section 1356 and the amendment to § 1333(a)(1) were enacted simultaneously. The district court thus had to reconcile two seemingly incon-

sistent provisions in the same legislation; the court was not determining whether one provision "repealed" the other. Furthermore, § 1333(a)(1) is written in general terms. It does not expressly refer to nonimmigrant workers or to the immigration laws. In contrast, § 1356 lays out a detailed system governing who may work on vessels and structures conducting regulated activities on the outer Continental Shelf, a system drawing distinctions between citizens and resident aliens and other workers and vesting discretion in the President to restrict or relax § 1356's rules on the composition of the workforce. The canon of statutory construction dictating that specific statutory provisions govern general ones would therefore lead us to favor § 1356 over § 1331(a)(1). *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Techniarts Eng'g v. United States*, 51 F.3d 301, 304 (D.C. Cir. 1995). The Supreme Court has instructed that if "there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (internal quotations omitted). No such clear intention emerges here.

Because we agree with the district court that the Immigration and Nationality Act does not apply to those who are manning or crewing foreign-owned derrick barges qualifying for the exemption set forth in § 1356(c)(2),[5] the judgment is affirmed.

---

[5] Citing *Montana v. United States*, 440 U.S. 147, 154 (1978), and *United Ass'n of Journeymen, Local 342 v. Valley Eng'rs*, 975 F.2d 611, 615 (9th Cir. 1992), the government claims that *Piledrivers' Local Union No. 2375 v. Smith*, 695 F.2d 390, 393 (9th Cir. 1982)—which decided the same legal issues as those raised here—collaterally estops the unions even though the unions were not named as parties. Because our decision on the merits is the same as that in *Piledrivers'*, we do not express any view on the preclusive effect of the Ninth Circuit's ruling.

EDWARDS, *Chief Judge*, dissenting: The Outer Continental Shelf Lands Act ("OCSLA"), first enacted in 1953, explictly applies federal law to all structures permanently or temporarily attached to the seabed of the Outer Continental Shelf ("OCS"). 43 U.S.C. § 1333(a)(1) (1988). Thus, for purposes of federal immigration law, stepping onto an oil platform on the OCS should be no different from stepping ashore at any harbor on the mainland: having set foot in United States territory, all aliens become subject to United States immigration restrictions.

In defiance of the plain terms of the statute, the majority holds that foreign workers who are on the OCS to construct a domestically-owned oil platform are nonetheless exempt from United States immigration restrictions if, under a Coast Guard regulation, they are found to "man or crew" a foreign-owned vessel that provides them temporary quarters while they complete the construction project. However, neither the statute nor good reason explains why workers constructing a domestically-owned oil platform on the OCS should be exempt from our nation's immigration laws simply because they happen to sleep on a foreign-owned barge anchored nearby. Indeed, such a result turns section 1356 of OCSLA, which requires that all OCS units be manned and crewed by United States citizens or permanent resident aliens, on its head. Instead of offering additional protection for American workers on the OCS, the provision has now been transformed into an enormous loophole by which United States corporations can employ foreign workers despite the ready availability of domestic labor. Because I find that today's decision perverts both the explicit language of section 1356 and the congressional intent behind the manning and crewing requirements, I dissent.

* * * *

As an initial matter, it is worth noting that the Coast Guard's definition of the manning and crewing require-

ments is both absurd and contrary to the statute. According to the Coast Guard, even though the workers in question perform all of their construction work on the oil platform itself, they are nevertheless deemed to man and crew the derrick barge on which they eat and sleep. *See United Ass'n of Journeymen v. Reno,* Civ. Action No. 90-2342, slip op. at 5 (D.D.C. June 24, 1994), *reprinted in* Joint Appendix 16. Yet, it is undisputed that there is no construction work being performed on the barge. Under the Coast Guard's interpretation, then, had the workers paddled out to the platform in an inflatable raft that also carried their food and a sleeping bag, they would be manning and crewing the raft (rather than the oil platform) for purposes of section 1356. This interpretation of the statute is nonsensical and therefore not entitled to this court's deference. The manning and crewing requirements were obviously designed to apply to the place where the workers work, not where they eat and sleep. Thus, there is no reason that the section 1356(c)(2) exemption regarding crew members on foreign-owned units should be relevant to the workers in this case because it is undisputed that the platform (as opposed to the barge) is not foreign-owned.

Moreover, even if one were to accept the Coast Guard's view that the workers should be considered part of the regular complement of the derrick barge, such a determination tells nothing more than who is "manning and crewing" a particular unit for purposes of section 1356. It does not address who is *working in the United States* pursuant to the Immigration and Nationality Act ("INA"), as applicable to the OCS under section 1333. There is no dispute that the oil platform is subject to the INA. Thus, even if these foreign workers are exempt from the INA while they float around on the barge, they essentially enter the United States every single day to come to work on the oil platform. The construction workers should therefore be treated no differently from any other crew memmber of a foreign ship who disembarks at

a United States harbor and enters the country. It would be ridiculous to say that, merely because such foreign workers man and crew a foreign-owned vessel, they are somehow exempt from this country's immigration laws while they are within United States borders.

Yet, the majority asserts not only that the workers should be deemed to man and crew the derrick barge even while working on the oil platform, but also that the exemption from manning and crewing requirements found in section 1356(c)(2) overrides all the regulations of the INA. This argument makes no sense.

* * * *

It is undisputed that section 1333 of OCSLA explictly applies all United States law, including the INA, to the OCS. Under the INA, nonimmigrant aliens, who generally consist of those seeking entry into the United States on a temporary basis, may qualify for visas only if they meet certain statutory criteria. *See* 8 U.S.C. § 1101(a)(15) (1994).

Nothing about section 1356 of the OCSLA amendments of 1978 evinces an intent to alter the INA's general application to the OCS, and neither the INA nor section 1333 is even mentioned in section 1356. Rather, section 1356(a) adds new manning and crewing requirements that restrict employment on the OCS to either United States citizens or permanent resident aliens. 43 U.S.C. § 1356(a) (1988). The effect of this provision is to prevent those nonimmigrant aliens who could receive visas under the INA from manning or crewing a vessel, rig, or fixed structure on the OCS. Thus, section 1356(a) is best read not as a replacement to the INA, but as a further restriction on employment of foreign workers on the OCS. Indeed, even with the provisions of the INA in effect, the Committee that originally drafted the manning and crewing requirements reported that it "was concerned . . . that foreign workers on the U.S. Outer Continental Shelf have

been increasing in recent years." H.R. REP. No. 590, 95th Cong., 1st Sess. 175 (1977).

Because section 1356(a), on its own, sweeps broadly and requires anyone operating on the OCS to hire only United States citizens or permanent resident aliens, it is not surprising that Congress carved out some exceptions, including the one for foreign ownership. 43 U.S.C. § 1356(c)(2). However, the plain language of section 1356(c) indicates that its exceptions were intended only as exemptions to the strict manning and crewing regulations issued under subsection (a), and *not* to the general application of the INA. Indeed, Congress could hardly have been more clear in its intent. Section 1356(c) is entitled, "Exceptions *from manning requirements*," and explicitly provides that, if any of the enumerated exceptions are applicable, "[t]he *regulations under subsection (a)(3) of this section* shall not apply." 43 U.S.C. § 1356(c) (emphasis added). As the Supreme Court has stated, where, as here, the statutory language is plain, " 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Instead, the majority, without any textual justification whatsoever, finds in section 1356(c) an implicit exemption, not only to the manning requirements, but to the INA as well.

The only way the majority can justify this strained reading of the clear language of the statute is to find that section 1356 and the INA are "mutually repugnant" and cannot logically coexist. However, although these provisions overlap in some respects, there are also significant areas in which they do not. Moreover, there is nothing to indicate that Congress intended that section 1356 would replace the INA with regard to employment on the OCS. Indeed, the legislative history of the 1978 amendments suggests that section 1356 was actually designed to close certain regulatory gaps that existed *despite* application of the INA to the OCS.

In certain situations, section 1356 applies when the INA does not. One such example is the regulation of free-floating vessels. Prior to the 1978 amendments, if a domestically-owned barge were performing work on the OCS, it could hire an all-foreign crew because the INA applies only to structures attached to the seabed, and not to vessels. Section 1356 remedies this absence of regulation by requiring that such a barge be manned and crewed by United States citizens or permanent resident aliens. If the barge were sold to a foreign-owned company, the exemption found in section 1356(c)(2) would then apply, and the barge would again face no labor restrictions.

Thus, section 1356 functions as an important supplement to the INA, rather than a replacement. Indeed, the legislative history indicates that section 1356 was, from the very beginning, an attempt to remedy the fact that free-floating vessels were not subject to any of the provisions of the INA that are designed to protect domestic jobs. At congressional hearings regarding the OCSLA amendments, the Seafarers International Union first proposed the manning and crewing requirements in order to fill the "major regulatory gap" that existed because the INA did not apply to free-floating vessels. *Outer Continental Shelf Lands Act Amendments of 1977: Hearings on H.R. 1614 Before the House Ad Hoc Select Committee On the Outer Continental Shelf,* 95th Cong., 1st Sess. 1258 (1977). In its statement, the union noted that

> [c]urrent U.S. law does not prevent foreign-flag and foreign crewed drilling rigs from operating on the U.S. Outer Continental Shelf. As a result, increasing numbers of aliens are being employed for extended periods in our OCS areas. In view of the large available pool of skilled U.S. construction and drilling trades and related service workers, we feel that the use of any foreign crews on these rigs is totally unnecessary.

Id. at 1302. According to the union, because the laws that were then applicable to the OCS did not prevent such foreign crews, further congressional action was necessary. *See generally id.* at 1258-1307.

The majority points out that section 1356 refers to fixed structures as well as free-floating vessels on the OCS. Because there is no question that the INA also applies to fixed structures, the question becomes whether both provisions can logically apply to one area. For example, a domestically-owned platform must be manned and crewed by United States citizens or permanent resident aliens pursuant to section 1356, but the platform (because it is attached to the seabed) is also subject to the INA's provision that nonimmigrant alien workers applying for so-called "H-2B" visas cannot enter the country if American workers are available. *See* 8 U.S.C. § 1101 (a)(15)(H)(ii)(b). In such a situation, the two provisions are duplicative. The majority stops there, assuming, solely because there is *some overlap*, that section 1356 must therefore be read to replace the INA altogether.

However, H-2B visas are not the only visas available to nonimmigrant aliens seeking to work on the OCS. The INA offers many other visa categories, and *none* of the other ways in which one can enter the country are subject to the labor-protecting provisions applicable to H-2B visas.[1] *See* 8 U.S.C. § 1101(a)(15). Thus, prior to the

[1] Indeed, these non-H-2B visa categories could well include significant numbers of technical, executive, and managerial employees who are part of the regular complement of units operating on the OCS. For example, the INA permits entry into the United States of nonimmigrants engaged in certain "specialty occupations" requiring at least a bachelor's degree, 8 U.S.C. § 1101(a)(15)(H)(i)(b), as well as nonimmigrants who have been employed outside the United States and then seek to enter the country temporarily in order to continue to render services to the same employer "in a capacity that is managerial, executive, or involves specialized knowledge," 8 U.S.C. § 1101(a)(15)(L).

1978 amendments, a foreign citizen who could qualify for entrance into the United States under any visa provision other than H-2B would have been free to work on a domestically-owned oil platform in the OCS regardless of the availability of United States labor. After the passage of section 1356, the owners of such an oil platform would be forced to hire only domestic labor despite the fact that they were not forced to do so under the INA. And again, if the platform were sold to a foreign-owned corporation, the 1356(c)(2) exemption would then apply, and the new owners would again be free to employ any non-H-2B aliens they wished. Thus, even on fixed structures, the two provisions can both be meaningfully enforced according to their terms.[2]

It is also implausible for the majority to assert that the manning and crewing requirements and their exceptions supplant the INA, because the INA is a broad statute that regulates all types of alien *entry* into the United States, whereas section 1356 only addresses the question of *employment* while in the country. Following the logic of the majority's view, workers falling under section 1356(c)(2)'s exception are subject to *no immigration restrictions at all.* For example, the INA provides that aliens who have communicable diseases, who have been convicted of a crime, or who have engaged in terrorist activity are inelligible to receive visas. *See* 8 U.S.C. § 1182(a). Surely it cannot be that Congress meant to foreclose the Immigration and Naturalization Service from

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[2] The majority argues that applying the INA along with section 1356 to the OCS is nonsensical because section 1356(c)(1)(A) permits aliens employed under contracts entered into prior to the effective date of the statute to remain on the OCS. According to the majority, such a provision would be useless if the provisions of the INA could be applied to exclude those same aliens. But this argument ignores all those aliens who might be employed on the OCS under visas other than H-2B visas. For those aliens, the "grandfathering" provision would have the important consequence of allowing them to remain on the OCS even though section 1356 would, for the first time, forbid their presence.

regulating the presence of known terrorists who are working in United States territory merely because those terrorists have been deemed to "man and crew" a foreign vessel.[8]

Finally, it is significant, I think, that the very same committee that drafted the 1978 amendments subsequently rejected the reading of section 1356 that the majority adopts today. While post-enactment pronouncements are ordinarily not dispositive regarding congressional intent, *see, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992), in this case, the Select Committee on the Outer Continental Shelf was specifically charged with overseeing and evaluating the Government's implementation of the new statutory provisions. H.R. REP. No. 1214, 96th Cong., 2d Sess. iii (1980). In its final oversight report, issued in 1980, the Committee, in no uncertain terms, flatly rejected the Government's position regarding section 1356, calling it "a blatant example of misinterpretation of the OCS Act on the part of an executive branch agency." *Id.* at 98. Further, the Report notes that "[Committee] Chairman John M. Murphy, who was intimately involved in negotiating the Section [1356] language in the OCS conference Committee disagrees with [the government's position], and views Section [1356] as a supplement to rather than a replacement of the provisions [of the INA]." *Id.* at 68. The report also quotes Chairman Murphy directly:

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[8] The majority also points to a clause in section 1356(c)(2) that permits the President to revoke the exemption for foreign-owned units whenever a foreign government imposes its own national manning requirements to its offshore oil and gas operations. According to the majority, such an action would be an "empty gesture" if the INA already forced foreign owners to employ American crews. However, as described *supra*, the INA would *not* apply to workers on free-floating vessels, nor would it restrict workers who had entered the United States under visas other than H-2B visas. Therefore, there is no reason to assume that presidential action under section 1356(c)(2) would be devoid of practical effect.

> As Chairman of both the House-Senate Conference and the House Select Committee on the OCS, I am quite familiar with the language . . . and I can emphatically state Congressional intent in this instance. . . . Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development and production.

Id. (internal quotation omitted).

Although this report, in and of itself, would not be enough to overturn clear statutory language to the contrary, it further supports the view that, in this case, the most obvious reading of the statute is, in fact, the reading Congress intended. *Cf. Cannon v. University of Chicago,* 441 U.S. 677, 687 n.7 (1979) ("Although we cannot accord [post-enactment] remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of [the statute]. . . ."). Given that section 1356 and the INA can both be enforced according to their terms without any mutual repugnancy, there is absolutely no justification for the majority to overturn the plain language of the statute and the clearly expressed legislative intent of Congress.[4]

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[4] The Government also claims in its brief that the two appellant unions are precluded from litigating the statutory construction issue in this case because of a previous Ninth Circuit decision rendered against a local affiliate union. *See Piledrivers' Local Union No. 2375 v. Smith,* 695 F.2d 390 (9th Cir. 1982). Because issue preclusion cannot be applied against a litigant who was not a party to the prior adjudication, *see* 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449 (1981), the Government argues that the United Brotherhood of Carpenters and Joiners, as the parent of the piledrivers' local, effectively controlled the first litgation and is therefore precluded from relitigating the issue under the Supreme Court's decision in *Montana v. United States,* 440 U.S. 147 (1979). *See id.* at 154-55 (The Court ruled that if a party were "the laboring oar" in a previous litigation, even if not a named party, preclusion is appropriate.). Although I am unconvinced that

The bottom line is that, by first enacting section 1333 (a)(1) in 1953, Congress made a clear policy choice to extend all federal law, including the INA, to the OCS. There is absolutely no indication that, in enacting section 1356 some 25 years later, Congress silently reversed that choice. As a result of the majority's erroneous interpretation, United States workers will lose job opportunities on the OCS, the very harm Congress sought to prevent by enacting section 1356. Domestic corporations wishing to construct oil platforms can now entirely avoid the labor-protecting provisions of the INA simply by using foreign-owned derrick barges to shelter the workers while they sleep. Because such a result makes a mockery of both the plain language of the statute and the congressional intent behind it, I dissent.

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the mere parent/affiliate relationship, by itself, is sufficient to show that the parent union controlled the litigation and should be precluded, that question is irrelevant because it is undisputed that the other union appellant in this case, the Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, has no affiliation with the local union plaintiff in *Piledrivers'*. Thus, even under the Government's theory, this union would not be precluded from bringing the present claim.

APPENDIX B

[Filed Jun. 24, 1994]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2342 (TAF)

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY, *et al.*,
Plaintiffs,

v.

JANET RENO, *et al.*,
Defendants.

MEMORANDUM OPINION

This matter comes before the Court on cross motions for summary judgment filed by the parties in this case. After consideration of said motions, all responsive memoranda thereto, and the entire record herein, and after hearing the argument of counsel in open court on May 13, 1994, the Court for the reasons stated herein will grant the defendants' motion and deny the plaintiffs' motion.

I. INTRODUCTION

The central issue in this case is whether non-immigrant alien workers are subject to the visa requirements of the Immigration and Nationality Act, ("INA") 8 U.S.C. § 1101 *et seq.*, when performing oil platform construction work on the Outer Continental Shelf ("OCS"). Plaintiffs, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO and the United Brotherhood of Carpenters and Joiners

of America, AFL-CIO, contend that these workers are so subject. The Defendants, the Attorney General of the United States, the Immigration and Naturalization Service ("INS"), the Secretary of State, the Secretary of Transportation and the United States Coast Guard, argue that they are not.

... an earlier ruling granting summary judgment in favor of the plaintiffs on this issue, the Court found that the INA, like all federal law, extends to the subsoil and seabed of the outer Continental Shelf under § 1333(a)(1) of the Outer Continental Shelf Lands Act of 1953 ("OCSL Act"). *United Ass'n of Journeymen v. Thornburgh,* 768 F.Supp. 375, 380 (D.D.C. 1991). That ruling went to the Court of Appeals, which in turn remanded the case after finding that a factual record needed to be developed on the question of whether § 1356 of the OCSL Act applied to the construction work done by the alien workers at issue here. *United Ass'n of Journeymen v. Barr,* 981 F.2d 1269, 1273-1275. The Court of Appeals reasoned that if the section did apply, the issue in this case would not be whether the immigration laws apply generally to the OCS, but whether aliens who fell within this section "were exempted from the immigration laws even if these laws otherwise applied". *Id.* at 1273.

Section 1356(a)(3), which is a 1978 amendment to the 1953 OCSL Act, directs the Coast Guard to issue rules requiring that "any vessel, rig, platform, or other vehicle or structure" used in regulated operations on the OCS be "manned or crewed . . . by citizens of the United States or aliens lawfully admitted to the United States for permanent residence". 42 U.S.C. § 1356(a) & (a)(3); *Barr,* 981 F.2d at 1273. Section 1356(c) contains a number of exceptions to this requirement, one of them being for any vessel or structure "over 50 percent of which is owned by citizens of a foreign nation or with respect to which the citizens of a foreign nation have the right effectively to control". 43 U.S.C. § 1356(c)(2);

981 F.2d at 1273. It is undisputed in this case that if the manning and crewing requirements of § 1356(a)(3) apply to the alien workers, so does this exception.

The Coast Guard regulations which grew out of § 1356 (a)(3) describe "manning and crewing" as referring to the "regular complement of a unit", which in turn "means those personnel necessary for the routine functioning of the unit". 33 C.F.R. § 141.15(a) & (b). In its earlier ruling this Court found § 1356(a)(3) inapplicable based upon the fact that the alien workers at issue were "not employees necessary for the routine functioning" of the oil production facilities they helped construct. *United Ass'n of Journeymen v. Thornburgh*, 768 F.Supp. 375, 381 (D.D.C. 1991). On appeal the Circuit Court assumed this to be true, but raised the issue of wheher these workers "could nevertheless be considered within § 1356 because they are manning the crane ship[1] from which they conduct their operations?". 981 F.2d at 1273.

The Court of Appeals raised two sets of question it indicated needed to be answered before this issue could be determined. It first inquired into how the Coast Guard interprets its own regulations in regard to construction workers on the OCS. It noted that in the preamble to these regulations, the Coast Guard referenced a comment suggesting that "construction workers building a platform be considered part of the regular complement of the construction barge from which they work, if that vessel's primary purpose is construction, fabrication, or alteration of structures attached to the Outer Continental Shelf." It also pointed out that the Coast Guard responded to this comment by stating that "the language of 141.15", the regulation in question, "already permits such a conclusion and no change has been made". 47 Fed. Reg. 9366, 9370 (1982); 981 F.2d at 1274.

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[1] The term used by the parties in the case on remand is not "crane ship" but "derrick barge". The Court will use the latter term in this memorandum.

The Court of Appeals then stated:

> It may be that the explanation in the Federal Register, although framed in terms of what would be a permissible reading of a regulation, reflects the Coast Guard's interpretation that section 1356(c)'s exemption for foreign-owned vessels and structures applies to construction workers engaged in the building of platforms on the outer Continental Shelf. But we remain uncertain whether, in general, the Coast Guard adheres to this position and, if so, why.

981 F.2d 1274.

The second set of questions the Court of Appeals mentioned regarded the actual type of work which was performed by the alien workers. Specifically, it wanted to know how the oil platforms were erected; the extent to which the workers moved back and forth from the ship to the structure while they were installing the jackets;[2] and what type of work was involved after the jackets were in place. *Id.* at 1274.

On remand, the defendants have presented the position of the Coast Guard principally through the December 8, 1993 deposition testimony of Michael P. De Cesare, a commander in the Coast Guard in charge of the Vessel Manning Branch, Coast Guard Headquarters, Washington, D.C. In the deposition, De Cesare made clear that the preamble does in fact express the Coast Guard's interpretation of its regulations as they relate to the workers at issue here:

> [I]n the preamble to the regulations, the issue of construction workers was specifically addressed and the conclusion was that construction workers aboard vessels principally involved in the construction of offshore platforms are a part of the regular complement of the vessel.

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[2] The "jackets" are premanufactured steel legs and infrastructure used to serve as foundations for the oil platforms.

De Cesare dep. at p. 29, 11. 15-19. He also explained the reasoning behind this conclusion by stating that because these construction workers "are engaged in the business of the vessel, which is constructing offshore platforms", they would be considered "the crew members or part of the complement of that vessel". De Cesare dep. at p. 22, 11. 7-11; *see also* 33 C.R.R. section 141.15(b). Defendants argue that Commander De Cesare's interpretation deserves deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

Plaintiffs, on the other hand, have on remand focused upon the nature of the work the aliens actually do on the outer Continental Shelf. In that regard, they have submitted the affidavits of Joel Harzan and James Lee Helms, who together have a combined experience of over thirty years of work on offshore oil platforms. These affidavits state that virtually all of the construction work involved in installing an oil platform occurs on the platform itself, after the jacket has been set on the ocean floor. During the installation process, construction workers sleep and eat on the derrick barge but, aside from crane operators and a few riggers, perform no work on that barge. Moreover, these affidavits indicate that construction workers are not treated as "crew" of derrick barges for documentation purposes.

Plaintiffs cite these facts and argue that the construction workers cannot "man" or "crew" vessels they do not even work upon. They argue alternatively that, even if these workers could be considered part of the regular complement of the derrick barges when they are on them, that doesn't mean § 1356 should apply in regard to the work they perform on the platform itself.

The parties have also raised the issue of whether, assuming the alien workers are covered by § 1356(c)(2), they should still be subject to the visa requirements of the INA. Plaintiffs argue that the plain language of the exceptions to § 1356(a)(3) show they apply only to the

manning and crewing requirements themselves. They argue that the Court should not read an additional exception regarding the provisions of the INA into this section when none exists within the language of the provision. Defendants argue that this Court is precluded from determining this question under the doctrine of issue preclusion. They state that the Ninth Circuit in *Piledrivers' Local Union No. 2375 v. Smith*, 695 F.2d 390 (9th.Cir. 1982) has already found that the INA is modified by § 1356, and argue that this Court is bound by that decision. They also argue that if the Court is not so bound, it should nevertheless reach the same conclusion as the *Piledrivers'* Court.[3]

II. DISCUSSION

A. *The Applicability of § 1356 to the Alien Construction Workers*

The deference due an agency's interpretation of its own regulations "exceeds even the deference (due) to 'an agency's construction of a federal statute that it administers' ". *United States of America v. Shaw*, No. 93-3193 slip op. at 6 (D.C.Cir. 1994) (quoting *Stinson v. United States*, 113 S.Ct. 1913, 1918 (1993)) (parenthesis added). If the interpretation "does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulations' ". *Stinson*, 113 S.Ct. at 1919 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

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[3] Defendants have also raised an issue regarding the Court's power to issue plaintiffs' proposed order, which seeks to have the Court order defendants to determine or redetermine the proper visa classifications of all aliens who are engaged in construction work or other temporary work on the OCS and revoke all B-1 visas granted in violation of the INA. The Court need not address this issue because, as noted, *supra*, it denies plaintiffs' motion for summary judgment *in toto*, and will therefore have no occasion to enter such an order.

Plaintiffs do not argue that Commander De Cesare's interpretation of the Coast Guard's manning and crewing regulations violates any of these principles. Rather, they argue that his deposition testimony is not sufficient in and of itself to constitute the official position of the Coast Guard. In this regard they point to the case of *Caiola v. Carroll*, 851 F.2d 395 (D.C.Cir. 1988), in which the Court of Appeals gave a "modicum of respect" but not "dispositive weight" to a decision reached by a debarring official for the Defense Logistics Agency (DLA), an agency of the Department of Defense (DOD), in a debarment case that had come before the official. *Caiola*, 851 F.2d at 399.[4]

Caiola, though, involved one agency official's interpretation of a regulation in a specific case under a specific set of facts. Commander De Cesare, on the other hand, did something much different than simply express his opinion on how § 1356(a)(3) of the OCSL Act should be applied to construction workers involved in the building of offshore oil platforms. He confirmed for the record, as the Court of Appeals had suspected, that the discussion of this issue found in the preamble to the manning and crewing regulations does in fact reflect the Coast Guard's

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[4] "Debarment" is an administrative action which excludes nonresponsible contractors from government contracting. The Federal Acquisition Regulation (FAR), codified at 48 C.F.R. Chapter 1, authorizes a debarring official, when it is "in the public interest", to "debar a contractor for any of the causes in 9.406-2 (of the FAR), using the procedures in 9.406-3". 48 C.F.R. 9.406-1(a); *Caiola*, 851 F.2d at 397. In *Caiola*, the plaintiffs were officers of Murdock Webbing, a Rhode Island corporation which manufactured military supplies for the federal government. Both Murdock and plaintiffs were debarred from further government work after it was discovered that Murdock had illegally fabricated certain test results regarding the equipment it manufactured. The issue in *Caiola* regarded the propriety of the debarring official's finding that plaintiffs had "reason to know", within the meaning of FAR 9.406-5(b), of Murdock's illegal conduct. *Id.* at 396-397.

official position on the subject. *See Barr*, 981 F.2d at 1274.[5]

Moreover, an April 3, 1989 State Department Cable submitted by defendants states:

> Department (of State) has received further clarification from the Coast Guard on this matter. State ref (previous cable referenced) mistakenly states that crew involved in the initial construction of a rig should be considered part of the complement of the rig and therefore subject to the manning requirements of the (OCSL Act) Amendments. The Coast Guard has now stated that until the rig or platform is operational it has no complement and therefore *the crew will continue to be viewed as crew of the barge exempt from the manning provisions of the act* provided that the barge is foreign owned or controlled.

April 3, 1989 State Department Cable No. 102429, attached as exhibit 1 to Defendant's Motion for Summary Judgement (emphasis and parenthesis added). This cable shows that Commander De Cesare's deposition testimony is not a *post hoc* rationalization of the preamble; it is an explanation of the continuous and long-standing interpretation the Coast Guard has given its manning and crewing regulations on the issue of how construction workers

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[5] There are other significant differences between *Caiola* and the case at bar. For instance, the regulation in question in *Caiola* was written and promulgated not only by the DOD, but by the General Services Administration and the National Aeronautics and Space Administration as well. "The diffusion of interpretive authority among several agencies, and the possibility of inconsistent interpretations, weaken(ed) the case for deference". *Id.* at 399. In this case the regulation in question was promulgated by the Coast Guard only. Moreover, the Court of Appeals in *Caiola* found that the debarring official was inconsistent in the way he interpreted the regulation. *Id.* Plaintiffs, though, have produced no evidence which suggests that the Coast Guard has ever taken a position different from the one espoused in the case at bar.

doing offshore oil platform work should be treated under these regulations. That being the case, the Court will review the Coast Guard's position under the deferential standards set forth by the Supreme Court in *Stinson* and *Bowles.*

The regulations in question describe workers who "man" or "crew" a vessel, rig, platform, or other vehicle or structure under § 1356(a)(3) as being "members of the regular complement of the unit". 33 C.F.R. §§ 141.15(a) (1990). The "regular complement of a unit" in turn means "those personnel necessary for the routine functioning of the unit . . ." *Id.* at 141.15(b). The Coast Guard views the construction workers as necessary for the "routine functioning" of the derrick barges because they carry out the business of the barges, which is the building of oil platforms on the outer Continental Shelf.

Plaintiffs assert that the phrase "regular function" should not be interpreted in terms of the mission of the unit, but in terms of the unit's physical ability to operate. Since the construction workers in question perform no part in either maintaining the barges or in helping them run, plaintiffs argue, they should not be considered members of the barges' regular complement. However, plaintiffs offer nothing to suggest that the Coast Guard's view is unreasonable. They simply argue that theirs is the *more* reasonable approach. The Court, though, is not free to pick and choose which interpretation it finds preferable. *See Orengo Caraballo v. Reich,* 11 F.3d 186, 193 (D.C.Cir. 1993). It must limit its focus to whether the *Coast Guard's* position is either "plainly erroneous" or "inconsistent with the regulation". *Stinson,* 113 S.Ct. at 414; *Bowles,* 325 U.S. at 414.

The Court finds that the Coast Guard's interpretation violates neither of these two standards. Certainly, there is nothing either unreasonable or irrational about defining a vessel or rig's "function" by the work it is engaged in

rather than by the work that is done upon it. Moreover, the Coast Guard regulations were issued pursuant to the directives of § 1356 of the OCSL Act, which Congress created to "reconcile the dual concerns of providing the fullest possible employment for Americans in U.S. (OCS) activities and eliminating to the fullest possible extent the likelihood of retaliation by foreign nations against American workers in foreign offshore activities". H.R.Conf. Rep. N. 1475, 95th Cong., 2d Sess. 123 (1978), *reprinted in* U.S. Code Cong. & Adm. News 1450, 1674, 1722. The Coast Guard has done nothing to undermine these goals by finding the construction workers at issue to be members of the regular complement of the derrick barges from which they work. The Court will therefore uphold the Coast Guard's position.

Plaintiffs argue alternatively that, even if the Court finds the construction workers to be part of the regular complement of the derrick barges as requested by defendants, that does not mean § 1356 of the OCSL Act should apply to them in regard to the work they do on the oil platforms. To this end, they point to language from the Coast Guard's commentary to the manning and crewing regulations which states that "a position may be part of the regular complement on one unit but not on another". 47 Fed.Reg. at 9370. The Court finds no merit to this assertion, though, because as discussed, *supra,* the Coast Guard defines the relationship between the construction workers and the derrick barges in terms of the labor these workers perform on the oil platforms. These workers are part of the regular complement of the barges because the work they do *on the platforms* is necessary to carry out the business of the barge. It is impossible to separate the work from the barge without disregarding the underlying rationale of Coast Guard's position. For that reason, the Court rejects plaintiffs' argument on this point.

B. *The Interplay Between § 1356 and the INA*

Under the INA, nonimmigrant aliens are precluded from entering the United States to perform skilled or unskilled labor, including construction work, unless persons willing and able to perform the work cannot be found in the United States and employing such aliens will not adversely affect the wages and working conditions of American workers. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Visas issued under section 1101(a)(15)(H)(ii)(b) are known as "H-2B" visas.

Defendants argue that these provisions of the INA should not be applied in addition to the exceptions in § 1356(a)(3) of the OCSL Act, because those exceptions would then be rendered virtually meaningless. Plaintiffs argue that the unambiguous language of the exceptions shows they apply only to the manning and crewing requirements of § 1356, and that the Court should not go beyond this plain language and exclude the visa requirements of INA when no such exclusion exists on the face of the statute. They also argue that the exceptions would be rendered meaningless if the INA were applied. The Court agrees with the defendants and finds that the visa requirements of the INA do not govern workers who are within the parameters of § 1356(a)(3) of the OCSL Act and the exceptions thereto.[6]

Plaintiffs' argument is based largely on the fact that neither § 1356(a)(3) nor its exceptions expressly supersede the INA. They argue that, since the Court has already found that the INA applies generally to the outer Continental Shelf, any finding that § 1356 modifies or supersedes the INA would fly in the face of the wide

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[6] Defendants also argue that this Court is bound by the *Piledrivers'* decision on this question under the doctrine of issue preclusion. Since the Court's own conclusion is consistent with that reached by the Ninth Circuit in *Piledrivers'*, the Court will not address this issue.

judicial reluctance to effect "repeals by implication".[7] They argue that the visa requirements of the INA and the exceptions in § 1356 of the OCSL Act must be "mutually repugnant"[8] before the former should fall, and that in construing the two the Court should not assume mutual repugnance but must attempt to give "effect to each while preserving their sense and purpose".[9] Plaintiffs assert that there is no such mutual repugnancy, so no repeal is necessary.

The Court disagrees with plaintiffs for a number of reasons. First, the INA itself does not extend its provisions to the outer Continental Shelf.[10] It reaches offshore activities through the operation of § 1333(a)(1) of the OCSL Act, which applies all federal law to the OCS. By finding that the INA does not govern workers covered by § 1356(a)(3), then, the Court has effected

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[7] Quoting from *Morton v. Mancari*, 417 U.S. 535, 549 (1974).

[8] Quoting from *United States v. Borden*, 308 U.S. 188, 198-99 (1939).

[9] Quoting from *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

[10] As the Court of Appeals noted in this case, under the INA nonimmigrant aliens:

> "must comply with the immigration laws in order to enter the United States. "Entry" is a term of art in immigration law. *See, e.g., Rosenberg v. Fleuti*, 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963); C. Gordon & S. Mailman, Immigration Law and Procedure § 11.10, at 11-1 (1992). The Immigration and Nationality act defines "entry" to mean "any coming of an alien into the United States, from a foreign port or place . . ." 8 U.S.C. § 1101(a)(13). " 'United States', when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States". 8 U.S.C. § 1101(a)(38). The term "continental United States" is defined as follows: "Whenever the phrase 'continental United States' is used in any law of the United States enacted after the date of enactment of this Act (June 25, 1959), it shall mean the 49 States on the North American Continent and the District of Columbia, unless otherwise provided" 1 U.S.C. § 1 note.

981 F.2d at 1271 n.1.

no "implied repeal" of the INA or any section thereof. It has merely found a discrete, narrowly tailored exception to the broad pronouncements of § 1333(a)(1) of the OCSL Act. Second, as plaintiffs themselves acknowledge, § 1356(a)(3) places restrictions upon alien workers which are in many aspects different from those found in the INA. Congress thus recognized with this section that the outer Continental Shelf has immigration concerns unique to it, concerns not adequately addressed by the INA.

That this evidences a congressional intent to replace, rather than add to, existing immigration law on the OCS is clear from the fact that, contrary to plaintiffs' assertions, § 1356 of the OCSL Act and the visa requirements of the INA *are* mutually repugnant. In arguing that they are not, Plaintiffs note that § 1333(a)(1) of the OCSL Act, and thus the INA, does not apply to free floating vessels.[11] Both section 1356(a)(3) and its exceptions, though, *do* apply to such vessels. Plaintiffs point out that aliens who man or crew free floating vessels on the OCS, and who fall within one of the exceptions to § 1356(a)(3), are thus able to work unencumbered by the visa requirements of the INA. Therefore, plaintiffs argue, application of the INA does not render the exceptions meaningless.

The flaw in plaintiffs' argument, though, is that §§ 1356(a)(3) and (c) apply not only to free floating vessels, but to "*any* vessel, rig, platform, or other vehicle or

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[11] That section states in relevant part that the constitution and all federal law extend to:

> the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . .

43 U.S.C. § 1333(a)(1).

structure". *Id.* (emphasis added) Under plaintiffs' theory, *all* non-immigrant alien construction workers who fell within the parameters of § 1356(a)(3) would be subject to that provision's *requirements*, while only those who manned or crewed free floating vessels or rigs would be able to benefit from the *exceptions* to those requirements. Nothing in either the face of § 1356 or in its statutory history suggests that Congress intended such an anomalous result.

Moreover, as defendants point out and as noted, *supra*, in enacting the manning and crewing requirements Congress sought not only to provide and preserve employment opportunuities for Americans pursuing work on the *U.S.* controlled OCS, but also to reduce the threat of foreign retaliation against American workers in *foreign* offshore activities. H.R.Conf.Rep. N. 1475, 95th Cong., 2d Sess. 123 (1978), *reprinted in* U.S. Code Cong. & Adm. News 1450, 1674, 1722. If alien workers on the OCS were subject to both § 1356 and the INA, the scales would invariably tip in favor of the first concern, thereby disrupting the balance of interests Congress hoped to create. The Court therefore finds that the INA does not govern non-immigrant alien construction workers who are covered by the exceptions to the manning and crewing requirements found in § 1356 of OCSL Act.

III. CONCLUSION

For the reasons expressed, *supra*, the Court finds that non-immigrant alien construction workers engaged in the building of oil platforms on the outer Continental Shelf are members of the "crew" of the derrick barges from which they work within the meaning of § 1356(a)(3) of the OCSL Act; the Court finds further that the provisions of the INA do not apply to these workers. Plaintiffs' motion for summary judgement is therefore denied, and defendants' motion for summary judgement is granted.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 27, 1992 Decided December 22, 1992

No. 91-5337

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL UNION NO. 412, *et al.*

v.

WILLIAM P. BARR, *et al.*,

Appellants

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 90-02342)

Before: MIKVA, *Chief Judge*, SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: Stated in its broadest terms, the issue presented is whether aliens, in order to perform work installing oil rigs on the outer Continental Shelf, must obtain visas of the type issued to nonimmigrant aliens entering the United States to perform temporary service or labor. Two federal statutes are involved: the Outer Continental Shelf Lands Act of 1953 ("OCSL Act"), 67 Stat. 462, as amended, 43 U.S.C. § 1331 *et seq.*; and the Immigration and Nationality Act, 8 U.S.C.

§ 1101 *et seq.* As suggested by the "Lands" in its title, the OCSL Act applies to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." 43 U.S.C. § 1333(a)(2)(A). One of its provisions, the meaning of which the parties dispute, extends federal law to these structures. 43 U.S.C. § 1333(a)(1). We are urged to decide whether § 1333(a)(1) requires alien construction workers to comply with United States immigration laws. For the reasons given below, we believe an important threshold issue, not addressed by the district court, must be decided first. We therefore vacate the judgment and remand.

I

A.

In 1945, President Truman issued an executive order announcing that the United States "regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas contiguous to the coasts of the United States and appertaining to the United States, subject to its jurisdiction and control." Proclamation 2667, 10 Fed. Reg. 12,303, *reprinted in* 59 Stat. 884. The Geneva Convention of the Outer Continental Shelf later recognized the claim. 3 U.N. Doc. A/Conf. 13/L.55, T.I.A.S. No. 5578. In the meantime, jurisdictional controversies arose between the federal government and several coastal States, culminating in Supreme Court opinions holding that the federal government had "paramount" rights over the area three miles seaward, and beyond, of each State's coastline. *United States v. California,* 332 U.S. 19 (1947); *United States v. Louisiana,* 339 U.S. 699, 704 (1950); *United States v. Texas,* 339 U.S. 707 (1950). While the States therefore could not grant oil and gas leases with respect to the submerged lands off their coasts, there was doubt whether the federal government could do so under the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437.

Congress intervened in 1953 with two major pieces of legislation. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315, relinquished all federal interest in the submerged lands within three geographic miles of the coast. *Maryland v. Louisiana*, 451 U.S. 725, 730 (1981). Later in the year, Congress enacted the Outer Continental Shelf Lands Act, reiterating that the "subsoil and seabed of the outer Continental Shelf"—which consists,with certain exceptions (H.R. REP. No. 590, 95th Cong., 1st Sess. 54 (1977)), of the submerged lands on the Shelf lying seaward of the three mile belt, 43 U.S.C. §§ 1331(a), 1301 (a)(2)—"appertain to the United States and are subject to its jurisdiction, control, and power of disposition. . . ." 43 U.S.C. § 1332(1).

In choosing a body of law to govern leasing and other activities on the outer Continental Shelf, Congress ultimately settled on a combined federal-state regime. *See* W. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 37-43 (1953). Section 1333(a)(2) applies the civil and criminal laws of adjacent States, except their tax laws, "[t]o the extent that they are applicable and not inconsistent with . . . other Federal laws and regulations." Section 1333(a)(1), the provision the parties focus on here, states:

> The Constitution and laws and civil political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state: *Pro-*

vided, however, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

B.

The events apparently precipitating this lawsuit occurred in 1989, when Heerema Marine Contractors, S.A., a Dutch-owned Swiss company employing nonimmigrant aliens, started construction work for Exxon Company, U.S.A., on the outer Continental Shelf off the coast of Santa Barbara, California. The district court, in its opinion, offers little in the way of detail about Heerema's activities. (Heerema is not a party; the company's United States affiliate appeared as an *amicus curiae*.) We gather from the record that Heerema's contract was limited to installing platform "jackets," that is, pre-manufactured steel legs and infrastructure, to serve as the foundations for two Exxon oil platforms—the Heritage and the Harmony. Heerema transported the jackets to the outer Continental Shelf and then secured them to the seabed, working from the BALDER, a semisubmersible crane vessel owned by a Heerema affiliate. The BALDER's crew consisted of aliens. Exxon owned the jackets, but according to Heerema's counsel, Heerema had custody and control of the jackets during the installation period.

Two labor unions representing American construction workers, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, sued the Attorney General, the Secretary of State, the Secretary of Transportation, the United States Coast Guard, and the Immigration and Naturalization Service. Citing § 1333(a)(1) of the OCSL Act, the unions claimed that the immigration laws barred alien employees from performing construction work on the Continental Shelf without first obtaining the appropriate visas. In

their complaint, the unions mentioned the two Exxon "platforms" as examples. Complaint ¶ 26.

Under the current version of the Immigration and Nationality Act, a nonimmigrant alien may temporarily enter the United States[1] to perform construction work if he possesses an H-2B visa. Before a consular officer may issue an H-2B visa, the employer petitioning for the alien's admission must obtain "certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers." 8 C.F.R. § 214.2(h)(6)(iv)(1); *see also* 8 U.S.C. § 1101(a)(15)(H)(ii)(b).[2] The basic 1952 Immigration and Nationality Act

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[1] Nonimmigrant aliens must comply with the immigration laws in order to enter the United States. "Entry" is a term of art in the immigration laws. *See, e.g., Rosenberg v. Fleuti*, 374 U.S. 449 (1963); C. GORDON & S. MAILMAN, IMMIGRATION LAW AND PROCEDURE § 11.10, at 11-1 (1992). The Immigration and Nationality Act defines "entry" to mean "any coming of an alien into the United States, from a foreign port or place. . . ." 8 U.S.C. § 1101(a)(13). " 'United States' . . . when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. § 1101(a)(38). The term "continental United States" is defined as follows: "Whenever the phrase 'continental United States' is used in any law of the United States enacted after the date of enactment of this Act [June 25, 1959], it shall mean the 49 States on the North American Continent and the District of Columbia, unless otherwise provided." 1 U.S.C. § 1 note.

[2] The Immigration Service does not believe the immigration laws apply on the outer Continental Shelf. Nevertheless, alien workers on the BALDER apparently held B-1 visas, which are available to nonimmigrant aliens who are "visiting the United States temporarily for business or temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B). ("Business" does not include construction work. 8 C.F.R. § 214.2(b)(5).) The government explains that these particular workers probably obtained the B-1 visas in order to visit the United States before proceeding to the outer Continental Shelf. Reply Brief for Appellants at 9. "[T]hose alien construction work-

contained similar provisions, §§ 101(a)(15), 212(a)(14), 66 Stat. 163, 167, 183, which trace their lineage to the anti-"coolie" act of 1875 and the Chinese Exclusion Acts, beginning in 1882. C. GORDON & S. MAILMAN, IMMIGRATION LAW, AND PROCEDURE § 20.03[1], at 20-11 to 20-12 (1992).

With the district court's approval, the parties agreed to stay all discovery. On cross-motions for summary judgment, the court ruled in favor of the unions, rejecting the government's position that aliens performing temporary construction work on the outer Continental Shelf were not required to obtain H-2B visas. The Immigration and Nationality Act applied to these workers, the court held, as a result of § 1333(a)(1) of the OCSL Act. *United Ass'n of Journeymen v. Thornburgh*, 768 F. Supp. 375 (D.D.C. 1991).

II

If we confined our attention to the activities of Heerema, as best we can discern them from the sparse record before us, one problem immediately presents itself. Installation of jackets takes but a short time. When Heerema's United States affiliate sought leave to file an *amicus* brief in the district court, it reported that the jackets already were in place. Heerema's crane ship BALDER, we may assume, is therefore no longer operating off the coast of Santa Barbara. The Ninth Circuit confronted a similar situation in *Piledrivers' Local Union No. 2375 v. Smith*, 695 F.2d 390 (1982), a mandamus action against the Attorney General and the Immigration Service to compel enforcement of the Immigration and Nationality Act on the outer Continental Shelf. There, "Heerema installed an offshore platform for Texaco using the foreign crew on the Challenger I," a foreign-owned heavy lift crane ship. *Id.* at 392. The installation, which took less than

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ers who proceed to the OCS without entering the United States," the government adds, "do not require any visa." *Id.*

a month, had been completed. *Id.* Although Heerema was no longer working on the outer Continental Shelf, the court of appeals found the case "ripe for adjudication" because the company shortly would be working there again: it had entered into a contract with Chevron to install another platform using the crew of the Challenger I. *Id.* The case before us differs from *Piledrivers* in the respect that Heerema has not entered into another contract to install jackets, or at least the record does not show as much. While this cuts against finding a live controversy, another difference points in the opposite direction. Unlike *Piledrivers,* the union's complaint here is general; Heerema's work for Exxon is cited by way of illustration. The basic challenge is to an ongoing practice of the federal government, permitting aliens not holding H-2B visas to perform the kind of work Heerema did for Exxon, work that members of the unions allegedly could undertake. The government has admitted that it treats aliens performing construction work on offshore oil platforms on the outer Continental Shelf as exempt from the immigration employment restrictions of the Immigration and Nationality Act. Even if the unions' action forcussed solely on Heerema's work for Exxon, the case would appear to fall within the exception to the mootness doctrine for issues "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911); *see Christian Knights of the Ku Klux Klan v. District of Columbia,* 972 F.2d 365, 369-71 (D.C. Cir. 1992). Since installation work on oil platforms is completed so quickly, there would not be suffiicent time for appellate review in the case of any one project.

We therefore turn to the merits. The unions frame the question as "whether the Immigration and Nationality Act applies to oil rig construction on the" outer Continental Shelf (Brief at 10) and assume the case depends entirely on the effect of § 1333(a)(1) of the OCSL Act. We think this formulation misses a preliminary point of significance.

Section 1356 of the OCSL Act, added in 1978, Pub. L. No. 95-372, tit. II, § 208, 92 Stat. 669, requires the Coast Guard to issue rules requiring that "any vessel, rig, platform, or other vehicle or structure" used in regulated operations on the outer Continental Shelf be "manned or crewed . . . by citizens of the United States or aliens lawfully admitted to the Unted States for permanent residence." 43 U.S.C. § 1356(a) & (a)(3). To this requirement, § 1356(c) makes an exception for any vessel or structure "over 50 percent of which is owned by citizens of a foreign nation or with respect to which the citizens of a foreign nation have the right effectively to control." 43 U.S.C. § 1356(c)(2).[3] According to the conference committee, § 1356 was intended to "reconcile the dual concerns of providing the fullest possible employment for Americans in U.S. Outer Continental Shelf activities and eliminating to the fullest possible extent the likelihood of retaliation by foreign nations against American workers in foreign offshore activities." H.R. REP. No. 1474, 95th Cong., 2d Sess. 123 (1978); *see also id.* at 124-26. *See also* Department of Justice, Office of Legal Counsel, *Memorandum Opinion for the General Counsel, Immigration and Naturalization Service,* No. 79-68, 3 Op. Off. Legal Counsel, 362, 366 (1979), in which Assistant Attorney General John M. Harmon agreed with the Immigration Service that the immigration laws do not apply on the outer Continental Shelf because § 1356 was "intended to be a self-contained statement of the extent to which principles of immigration control are to be applied."

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[3] Section 1356(c)(1) contains two other exceptions. The requirements of § 1356(a) do not apply if:

> (B) there are not a sufficient number of citizens of the United States, or aliens lawfully admitted to the United States for permanent residence, qualified and available for such work; or
>
> (C) the President makes a specific finding, with respect to the particular vessel, rig, platform, or other vehicle or structure, that application would not be consistent with the national interest.

When construction workers erect the foundation for an oil platform on the outer Continental Shelf are they manning or crewing a vessel, rig, platform, or other vehicle or structure, and thus within § 1356? If they are covered, the issue raised by this case is far narrower than the unions suppose. Rather than deciding whether the immigration laws generally apply—the issue considered by the Office of Legal Counsel—we would need to determine only whether aliens manning or crewing foreign-owned facilities, and thus within the § 1356(c)(2) exception, were exempted from the immigration laws even if these laws otherwise applied. The district court never reached this issue because it found § 1356 inapplicable: Coast Guard regulations say that manning and crewing refers to the regular complement of a unit (33 C.F.R. § 141.15 (a) & (b)); in the court's words, "temporary construction workers are not employees necessary for the routine functioning of an oil production facility"; therefore, "temporary construction workers are not encompassed by the manning and crewing requirement of § 1356(a)(3)." 768 F. Supp. at 381. But if, as the district court said, employees are not part of the regular complement of the oil platform they are constructing, should they nevertheless be considered within § 1356 because they are manning or crewing the crane ship from which they conduct their operations in installing the jacket? Section 1356 covers not only those working on platforms but also those working on "vessels" performing regulated activities on the outer Continental Shelf. This is the point of the Ninth Circuit's decision in *Piledrivers*, holding that the aliens working for Heerema on the foreign-owned ship Challenger I were covered by the exception in § 1356(c)(2). 695 F.2d at 393-94. The district court's interpretation may also be at odds with the Coast Guard's reading of its regulations cited by the court. In discussing its final rule implementing § 1356, promulgated several months before the *Piledrivers* decision, the Coast Guard mentioned one comment suggesting "that construction

workers building a platform be considered part of the regular complement of the construction barge from which they work, if that vessel's primary purpose is construction, fabrication, or alteration of structure attached to the Outer Continental Shelf." The Coast Guard responded: "The language of 141.15"—on which the district court relied—"already permits such a conclusion and no change has been made." 47 Fed. Reg. 9366, 9370 (1982).

On this record we cannot determine the applicability of § 1356. The Coast Guard enforces this provision. It may be that the explanation in the Federal Register, although framed in terms of what would be a permissible reading of a regulation, reflects the Coast Guard's interpretation that § 1356(c)'s exemption for foreign-owned vessels and structures applies to construction workers engaged in the building of platforms on the outer Continental Shelf. But we remain uncertain whether, in general, the Coast Guard adheres to this position and, if so, why. The district court, as we have said, did not mention the subject. The record contains little information about how platforms are erected. It does not reveal, for instance, the extent to which workers move back and forth from the ship to the structure while they are installing a jacket.[4] We cannot tell what the situation is after a jacket is in place. It is obvious that additional construction work must be done

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[4] If the alien construction workers man or crew the vessel rather than the jacket, there may be some doubt whether § 1333(a)(1) would have any application to them, wholly apart from the exception in § 1356(c)(2). Unlike § 1356, which applies to "any *vessel*, rig, platform, or other *vehicle* or structure," § 1333(a)(1) does not expressly mention "vessels" except by way of exclusion: § 1333(a)(1) extends federal law to "artificial islands, and all installations and other devices permanently or temporarily attached to the seabed" and to "any such installation or other device (other than a ship or vessel) for the purpose of transporting" resources from the seabed and subsoil of the outer Continental Shelf. On the other hand, § 1333(a)(1) might be considered applicable on the basis that these employees are engaging in an "installation," regardless of whether they are accomplishing the task from a vessel not otherwise included within the terms of the provision.

in order to make the platform operational. Yet there is nothing before us to indicate whether this type of work is customarily performed by nonimmigrant aliens temporarily stationed on American-owned platforms rather than by members of the platforms' regular complement, who would all be citizens or permanent resident aliens as § 1356 requires. With respect to the BALDER, the Coast Guard wrote in April 1989 that because the ship was foreign owned, it was "exempt under 43 U.S.C. 1356 from manning by U.S. citizens. . . ." Congressman Berman thereafter inquired "whether workers who are constructing and installing an offshore platform are technically 'manning or crewing' the platform rather than the construction barge, for the purpose of" § 1356. The Coast Guard replied without directly answering the inquiry. It simply quoted the portion of the Federal Register set out in the preceding paragraph. We therefore cannot even be sure how the Coast Guard viewed the situation with respect to the BALDER and its foreign crew, or why.

The short of the matter is that the broad question whether the Immigration and Nationality Act generally applies on the outer Continental Shelf should not be decided while § 1356's applicability remains unresolved. The government argued here and in the district court that the Heerema's alien workers were within § 1356(c)'s exception for crews of foreign-owned vessels[5] and that to require them nevertheless to qualify for H-2B visas would "render the manning and crewing requirements and their exceptions virtually meaningless." Brief for Appellants at 18. Before granting summary judgment in favor of the unions, the district court should have ruled on the gov-

[5] The government also contended that § 1356(c) exempted these workers because, during construction, the jackets were under the control of Heerema. Brief for Appellants at 18-19. Section 1356(c)(2) exempts from § 1356(a)'s employment restrictions, any platform or other structure "with respect to which the citizens of a foreign nation have the right effectively to control. . . ."

ernment's contentions or required further development of the pertinent facts despite the agreement of the parties to stay all discovery. We therefore vacate the district court's judgment and remand for further proceedings consistent with this opinion.

So Ordered.

APPENDIX D

[Filed Aug. 7, 1991]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2342
Judge Flannery

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, AFL-CIO, *et al.*,

Plaintiffs,

v.

RICHARD THORNBURGH, *et al.*,

Defendants.

MEMORANDUM OPINION

Plaintiffs, two labor unions representing American construction workers, bring this action challenging certain practices of the defendant executive branch officials and agencies involving employment of nonimmigrant aliens to perform construction work on oil rigs located on the United States' Outer Continental Shelf ("OCS.") At issue is which set of statutes and regulations governs the challenged practices. Plaintiffs contend that the employment of nonimmigrant aliens is subject to the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, and its accompanying regulations, which allow work to be performed by nonimmigrant aliens only when no American workers are available and when the wages and working conditions of American workers will not be adversely affected. Defendants argue that the 1978 amendments

to the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, contain provisions pertaining to the employment of nonimmigrant aliens that preclude application of the INA on the OCS. As discussed below, the Court finds that the INA applies to the employment of nonimmigrant construction workers on oil rigs located on the OCS.

I. *Statutory and Regulatory Background*

A. The Immigration and Nationality Act

The INA defines an "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101 (a)(3). Aliens are divided into two groups: "immigrants" and "nonimmigrants." For purposes of this litigation, an immigrant may be defined as an alien entering the United States with the intention of establishing permanent residence. *See id.* § 1101(a)(15). The INA specifies several categories of aliens who shall be considered nonimmigrants, including "an alien having residence in a foreign country which he has no intention of abandoning . . . who is coming temporarily to the United States . . . to perform . . . temporary service or labor . . ." *Id.* § 1101(a)(15)(H)(ii)(b). The latter category of aliens may be admitted to the United States only "if unemployed persons capable of performing such service or labor cannot be found in this country . . ." *Id.*

Immigration and Naturalization Service ("INS") regulations provide that nonimmigrants entering the United States pursuant to § 1101(a)(15)(H)(ii)(b) of the INA are granted "H-2B" visas. 8 C.F.R. § 214.2(h)(1), (h)(1)(ii)(B)(2) (1991). An H-2B visa may be issued only upon

> (*1*) A certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment

> will not adversely affect wages and working conditions of similarly employed United States workers; or
>
> (2) A notice detailing the reasons why such certification cannot be made. Such notice shall address the availability of U.S. workers in the occupation and the prevailing wages and working conditions of U.S. workers in the occupation.

Id. § 214.2(h)(6)(iv) (1991).[1]

B. The Outer Continental Shelf Lands Act

Congress enacted the OCSLA in 1953 in order "to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources." S. Rep. No. 411, 83d Cong., 1st Sess. 2 (1953).[2] Section 1333(a)(1) of the OCSLA provides:

> The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and to all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon

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[1] In their pleadings, the unions cite to the 1990 version of the certification requirement, found at 8 C.F.R. § 214.2(h)(4) (1990). This version is substantively the same as the 1991 certification requirement, although the 1991 regulation has been renumbered and contains slightly different language. Because the unions seek prospective injunctive relief, it is proper to consider the 1991 version of the regulation rather than the version in effect at the time this lawsuit was filed. Because the 1990 and 1991 certification requirements are substantively identical, this action is not rendered moot by the amendment and reissuance of the INS regulations.

[2] The Outer Continental Shelf is defined as "all submerged lands lying seaward and outside" the three-mile area extending from the United States coastline. 43 U.S.C. §§ 1301(a)(2), 1331(a).

> for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . .

43 U.S.C. § 1333(a)(1).[3]

In 1978, Congress amended the OCSLA by adding § 1356(a)(3) and (c). Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 30, 92 Stat. 629, 669-70. This section, applicable to the OCS, provides:

> (a) Regulations
>
> Within six months after September 18, 1978, the Secretary of the Department in which the Coast Guard is operating shall issue regulations which require that any vessel, rig, platform, or other vehicle or structure—
>
> * * *
>
> (3) . . . be manned or crewed, except as provided in subsection (c) of this section, by citizens of the United States or aliens lawfully admitted to the United States for permanent residence.
>
> * * *

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[3] In 1978, Congress enacted certain amendments to § 4(a)(1) of the OCSLA of 1953, *codified at* 43 U.S.C. § 1333(a)(1), intended to make

> clear that Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, delevopment, and production. . . . [including] activities on drilling ships, semi-submersible drilling rigs, and other watercraft, when they are connected to the seabed by drillstrings, pipes, or other appurten[an]ces, on the OCS for exploration, development, or production purposes.

H.R. Rep. No. 95-590, 95th Cong., 2d Sess. 128 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 1450, 1534.

(c) Exceptions from manning requirements

The regulations issued under subsection (a)(3) of this section shall not apply—

(1) to any vessel, rig, platform, or other vehicle or structure if—

(A) specific contractual provisions or national registry manning requirements provide to the contrary;

(B) there are not a sufficient number of citizens of the United States or aliens lawfully admitted to the United States for permanent residence, qualified and available for such work; or

(C) the President makes a specific finding, with respect to the particular vessel, rig, platform, or other vehicle or structure, that application would not be consistent with the national interest; and

(2) to any vessel, rig, platform, or other vehicle or structure, over 50 percent of which is owned by citizens of a foreign nation or with respect to which the citizens of a foreign nation have the right effectively to control, except to the extent and to the degree that the President determines that the government of such foreign nation or any of its political subdivisions has implemented, by statute, regulation, policy, or practice, a national manning requirement for equipment engaged in the exploration, development, or production of oil and gas in its offshore areas.

43 U.S.C. § 1356(a)(3), (c).

II. *Factual Background*

Defendants are various executive branch officials and agencies (hereinafter "the government") charged with

administering the INA and the OCSLA. The unions have identified two oil rig construction projects located on the OCS in which they alleged that the government has allowed employment of nonimmigrants in violation of the INA. These oil platforms—the Heritage and Harmony platforms located off the coast of Santa Barbara, California—are being constructed by Heerema Marine Contractors S.A., a Dutch-owned company.

The unions allege that the government has issued nonimmigrant construction workers "B-1" visas,[4] which, unlike H-2B visas, do not require a certification from the Secretary of Labor regarding the unavailability of American workers or the effect of nonimmigrant labor on American wages and working conditions.[5] The government admits that nonimmigrants who present themselves for admission at a United States Port of Entry must

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[4] B-1 visas are issued to nonimmigrants entering the United States "temporarily for business or temporarily for pleasure." 8 U.S.C. § 1101(a)(15)(B). B-1 visas are not available to nonimmigrants entering the United States to perform temporary "skilled or unskilled labor," *id.*, or "to perform building or construction work." 8 C.F.R. § 214.2(b)(5) (1991).

[5] The unions rely upon published INS Operating Instructions in arguing that the government has a practice or policy of issuing B-1 visas to nonimmigrants destined for the OCS. Operations Instruction 214.2(b) provides that

> Persons engaged in activities on the *outer continental shelf* are under the jurisdiction of the United States Coast Guard. Any person inquiring about his or her right to engage in employment on the outer continental shelf should be referred to the Coast Guard. Nonimmigrants destined to the outer continental shelf normally will be classified B-1, and the consular officers will annotate such visas "OCS[.]"

INS Operations Instruction 214.2(b); *see also* INS Operations Instruction 235.1 (same).

The INS operations Instructions do not specify which classes of nonimmigrants are to be issued B-1 visas. To the extent that these Operations Instructions are relevant to the Court's decision, the Court must assume that they express a policy of issuing B-1 visas to all nonimmigrants destined for employment on the OCS.

possess a visa in order to enter the United States prior to proceeding to the OCS. The government also admits that these nonimmigrants are issued B-1 visas, but it contends that such visas are required solely for the purpose of entering the United States and not for the purpose of performing work on the OCS. The government claims that no visa of any type need be issued if the nonimmigrant proceeds directly to the OCS work site without first entering the mainland United States.

III. *Discussion*

This case is not the first attempt to reconcile the visa requirements of the INA with § 1356 of the OCSLA. In 1982, the Ninth Circuit considered the relationship between these two statutes in *Piledrivers' Local Union No. 2375 v. Smith*, 695 F.2d 390 (9th Cir. 1982). In *Piledrivers*, the Circuit considered whether the visa requirements of the INA applied to nonimmigrant workers employed as crew members on foreign-owned heavy lift crane ships in constructing offshore drilling and production platforms. *Id.* at 391. The Court began its analysis by noting that Congress, in enacting the OCSLA in 1953, intended that the INA apply to employment of aliens on the OCS. *Id.* at 393 (quoting S. Rep. No. 411, 83d Cong., 1st Sess. 24 (1953)). The Court also found that Congress intended the 1978 amendments to "restate and clarify and not change existing law." *Id.* (quoting H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 80 (1978), *reprinted in* 1978 U.S. Cong. Code & Admin. News 1450, 1674, 1679). Having found that Congress in 1978 did not intend to repeal application of the INA to the OCS, and "see[ing] no irreconcilable conflict between section 1356 and the I.N.A.," the Ninth Circuit ruled that "the I.N.A. applies to the outer continental shelf except as modified by 43 U.S.C. § 1356." *Id.*

Turning to the facts of the case before it, the *Piledrivers* Court found that employment of nonimmigrants on the foreign-owned crane ship Challenger I fell within the

"foreign ownership exception" of § 1356(c)(2) of the OCSLA. 695 F.2d at 394. The Court's entire discussion of this holding is as follows:

> Challenger I is owned by foreign citizens. We, therefore, hold that the foreign ownership exception is applicable here, and that the crew of Challenger I is exempt from the certification requirements of the I.N.A.

Id.

Neither party urges the Court to adopt the decision in *Piledrivers,* and, in any event, the Court does not find *Piledrivers* to be binding or persuasive precedent on the issue raised by this litigation. In addition to the brevity of the Circuit's reasoning, which provides little guidance on this difficult issue of statutory interpretation, the Court finds that *Piledrivers* ignores the plain language of § 1356. By its very terms, § 1356(c) sets forth exceptions to "[*t*]*he regulations issued under subsection (a)(3) of this section* . . ." 43 U.S.C. § 1356(c) (emphasis added). Nowhere does § 1356(c) purport to create exceptions to application of the INA, as held by the *Piledrivers* Court. Courts are obligated to give effect to the plain and unambiguous meaning of a statute, and exceptions to clearly delineated statutes will be implied only when the plain language would give rise to absurd results or to consequences obviously at odds with the underlying statutory scheme. *United States v. Rutherford,* 442 U.S. 544, 551-52 (1979) (citing cases). The *Piledrivers* Court not only ignored the plain language of § 1356(c), which expressly limits application of its exceptions to the Coast Guard regulations promulgated pursuant to § 1356(a)(3), but it also read § 1356(c) to imply an exception to a wholly independent statute, the INA, without providing any legal support or detailed discussion of its rationale for deciding upon such an unusual statutory construction. Thus, the Court declines to follow *Piledrivers.*

Reconciliation of the provisions of the INA and the OCSLA was also attempted by the Office of Legal Coun-

sel ("OLC") shortly after passage of the 1978 OCSLA amendments. *See* Memorandum Opinion for the General Counsel, Immigration and Naturalization Service, No. 79-68, 3 Op. Off. Legal Counsel 362 (1979). Upon reviewing the statutory language and legislative history, the OLC concluded that § 1333(a)(1) of the OCSLA, "standing alone, is broad enough to require application of the Immigration and Naturalization Act to drilling rigs on the Shelf." *Id.* at 365. Upon consideration of the eflect of § 1356's specific language, however, the OLC found that "[t]he only conclusion that makes sense . . . is to assume that § [1356] is intended to be a self-contained statement of the extent to which principles of immigration control are to be applied." *Id.* at 366.

The OLC gave two reasons for its conclusion that § 1356 displaces the INA. First, the OLC found that the immigration laws do not include the authority to create exceptions parallel to those of § 1356, "and [that] the 1978 amendments do not purport to modify the Immigration and Naturalization Act." 3 Op. Office Legal Counsel at 366. Second, the OLC raised the pragmatic concern that giving effect to both statutes on the OCS would have the undesirable effect of vesting jurisdiction to enforce similar statutory provisions in two agencies, the INS and the Coast Guard. *Id.* n. 7. The OLC believed that this would result in inconsistent application of the laws and duplication of agency efforts. *Id.*

The Court disagrees with the OLC's conclusion that § 1356 of OCSLA precludes application of the INA on the OCS. It is a " 'cardinal rule' " of statutory interpretation " 'that repeals by implication are not favored.' " *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). The intention of the legislature to repeal the earlier statute must be clear and manifest. *Tennessee Valley Auth'y v. Hill*, 437 U.S. 153, 189-90 (1979) (citing cases). "[R]epeals [by implication] are strongly

disfavored on the ground that Congress is normally expected to be aware of its previous enactments and to provide a clear statement of repeal . . ." *Samuels v. District of Columbia*, 770 F.2d 184, 195 (D.C. Cir. 1985).

An intent to repeal an earlier statute may be found in one of two ways. The Court first must look for some indication of an intent to repeal in the statutory language and in the legislative history of the statute. *See Morton*, 417 U.S. at 550. "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Id.* (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945)).

The language of the OCSLA reveals no express intent to repeal the INA.[6] Likewise, the legislative history of the OCSLA contains no indication of a congressional intent to preclude application of the INA on the OCS. Certainly in 1953 Congress believed that the INA should apply to the OCS. *See* 3 Op. Off. Legal Counsel at 364-65. Prior to pasage of the original OCSLA, Congress deleted from the Senate bill specific language dealing with the employment of aliens, explaining that "since all applicable Federal laws are extended to the seabed and subsoil of the outer shelf [by § 1333(a)(1)], the specific provisions respecting aliens are believed unnecessary." S. Rep. No. 411, 83d Cong., 1st Sess. 24 (1953).

When Congress amended § 1333(a)(1) of the OCSLA in 1978, it noted that the changes were merely technical in nature, intended to clarify the applicability of federal law to oil production facilities located on the OCS, and that the amendments were "meant to restate and clarify

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[6] Quite to the contrary, the plain language of the OCSLA indicates an intention to make all federal laws applicable to the OCS. *See* 43 U.S.C. § 1333(a)(1); *see also id.* § 1333(f) ("The specific application by this section of certain provisions of law to the [OCS] . . . shall not give rise to any inference that the application . . . of any other provision of law is not intended.").

and not change existing law. Under the conference report language, Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production." H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 80 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 1674, 1679; *see also* H.R. Rep. No. 590, 9th Cong., 2d Sess. 128, *reprinted in* 1978 U.S. Code Cong. & Admin. News at 1534. Thus, the Court finds that Congress in 1953 intended that the INA be applicable to the OCS, and that Congress in the 1978 amendments to the OCSLA did not clearly express an intention to repeal application of the INA on the OCS.

Absent an express indication of congressional intent to repeal the INA, "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton*, 417 U.S. at 550 (citation omitted). The Court does not find the INA and the OCSLA to be irreconcilable as applied to the facts of this case. Section 1356(a)(3) directs the Coast Guard to issue regulations requiring that, subject to the exceptions set forth in subsection (c), oil production facilities be "manned or crewed" by United States citizens or immigrants. 43 U.S.C. § 1356(a)(3). Unfortunately, the OCSLA does not define the phrase "manned or crewed." The Court finds that the meaning of this phrase is determined by reference to two non-statutory sources.

In the legislative history to the 1978 amendments, Congress indicated that "[t]he provision as to use of citizens and permanent resident aliens applies only to 'manning' or 'crewing.' Thus, specialists, professionals, or other technically trained personnel called in to handle emergencies *or other temporary operations* would not be included." H.R. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 125, *reprinted in* 1978 U.S. Cong. Code & Admin. News at 1724 (emphasis added); *see also* H.R. Rep. No. 590, 95th Cong., 2d Sess. 177, *reprinted in* 1978 U.S. Cong. Code & Admin. News at 1582 ("specialist called in to handle an emergency situation would not be included" in " 'manning' or 'crewing' " provision of § 1356(a)(3)).

The meaning of OCSLA's manning or crewing requirement may be further discerned by reference to the Coast Guard regulations promulgated pursuant to § 1356(a). *See* 33 C.F.R. §§ 141.1-.35 (1990). These regulations, which mirror the statutory restrictions on employment of nonimmigrants contained in § 1356, provide that

> (a) On or after April 5, 1983, each employer of personnel on any unit engaged in OCS activity that is subject to this part must employ, as members of the regular complement of the unit, only citizens of the United States or resident aliens except as provided by § 141.20.
>
> (b) As used in paragraph (a) of this section, "regular complement of a unit" means those personnel necessary for the routine functioning of the unit . . . The term does not include specialists, professionals, or other technically trained personnel called in to handle emergencies or other temporary operations; extra personnel on a unit for training; *and other personnel temporarily on a unit for specialized operations, such as construction,* alteration, well logging, or unusual repairs or emergencies.

Id. § 141.15 (emphasis added).[7]

Based upon the legislative history of § 1356 and the regulations promulgated pursuant to that section, the Court finds that temporary construction workers are not employees necessary for the routine functioning of an oil production facility, and, thus, that temporary construction workers are not encompassed by the manning and crewing requirement of § 1356(a)(3). Because § 1356 does not purport to apply immigration restrictions to the types of nonimmigrant employees subject to this litigation, the

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[7] The Coast Guard regulations also provide for exceptions to the employment restrictions of 33 C.F.R. § 141.15(a) which are substantially the same as the exceptions to the manning or crewing requirement found in 43 U.S.C. § 1356(c). *See* 33 C.F.R. § 141.20.

Court finds that, on the facts of this case, there is no conflict between § 1356 of the OCSLA and the general immigration provisions of the INA. Because the INA and the OCSLA are not irreconcilable, there can be no finding by the Court that the OCSLA repeals by implication the INA. *See Morton*, 417 U.S. at 550. The Court having found that the 1978 OCSLA amendments did not effect a general repeal of application of the INA to the OCS, and the Court now finding that § 1356 (a)(3) does not repeal by implication application of the INA to nonimmigrant construction workers on the OCS, the Court concludes that the INA applies to these workers and that the government must comply with the relevant visa provisions of the INA.[8]

IV. *Conclusion*

For the foregoing reasons, the Court finds that the employment of nonimmigrant construction workers on the OCS is subject to the requirements of the INA. The Court declares the government's practice of allowing nonimmigrants to perform such work on the INA without complying with the relevant provisions of the INA and its accompanying regulations to be illegal. The Court enjoins the government from continuing these illegal practices in the future, and the Court further directs the government to immediately undertake steps to ensure compliance wih the visa requirements of the INA and relevant administrative regulations. An appropriate Order accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
United States District Judge

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[8] The Court's finding is limited to the facts of this case. The Court does not decide whether the 1978 amendments to the OCSLA modify or repeal the INA as applied to the employment of workers other than those hired to perform temporary construction work on the OCS. Specifically, the Court does not decide whether the OCSLA repeals application of the INA to employees who are encompassed by the manning and crewing requirement of § 1356(a)(3).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2342

Judge Flannery

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, AFL-CIO, *et al.*,

Plaintiffs,

v.

RICHARD THORNBURGH, *et al.*,

Defendants.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is by the Court this 6th day of August 1991

ORDERED that plaintiffs' motion for summary judgment be, and it hereby is, GRANTED in accordance with this Order and the accompanying Memorandum Opinion; and it is further

ORDERED that defendants' motion to dismiss or for summary judgment be, and it hereby is, DENIED; and it is further

DECLARED that defendants Richard L. Thornburgh, the Immigration and Naturalization Services, James A. Baker III, Samuel K. Skinner, and the United States Coast Guard have violated Sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(B) and 1101(a)(15)(H)(ii), and the regulations promulgated thereunder, 8 C.F.R. § 214.2(h)(6)(iv) (1991); by permitting non-immigrant aliens to perform construction work or other similar skilled or unskilled labor of a temporary nature on the United States Outer Continental Shelf without

complying with the Labor Department certification procedures in 8 C.F.R. § 214.2(h)(6)(iv) (1991); and it is further

ORDERED that the defendants, their successors, employees, agents and assigns, and all persons acting in concert with them, be, and they hereby are, ENJOINED to:

(a) cease enforcing or giving effect to any and all rules, regulations, policies, and practices pursuant to which nonimmigrant aliens are permitted to perform construction work or other similar skilled or unskilled labor of a temporary nature on the United States Outer Continental Shelf without the labor certification procedures required by 8 C.F.R. § 214.2 (h)(6)(iv) (1991);

(b) determine or redetermine the proper visa classifications, if any, of all nonimmigrant aliens who are currently engaged in construction work or other similar skilled or unskilled labor of a temporary nature on the United States Outer Continental Shelf and who have not previously been issued visas in accordance with the labor certification procedures required by 8 C.F.R. § 214.2(h)(6)(iv) (1991);

(c) comply with Sections 101(a)(15)(B) and 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(15)(B) and 1101 (a)(15)(H)(ii), and 8 C.F.R. § 214.2(h)(6)(iv) (1991) in future determinations of the proper visa classifications of nonimmigrant aliens admitted to the United States for purposes of performing construction work or other similar skilled or unskilled labor of a temporary nature.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX E

OUTER CONTINENTAL SHELF LANDS

43 U.S.C. § 1331 et seq.

§ 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control: . . . .

* * * *

§ 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter; . . . .

* * * *

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for,

developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. . . .

* * * *

§ 1356. Documentary, registry and manning requirements

(a) Regulations

Within six months after September 18, 1978, the Secretary of the Department in which the Coast Guard is operating shall issue regulations which require that any vessel, rig, platform, or other vehicle or structure—

(1) which is used at any time after the one-year period beginning on the effective date of such regulations for activities pursuant to this subchapter and which is built or rebuilt at any time after such one-year period, when required to be documented by the laws of the United States, be documented under the laws of the United States;

(2) which is used for activities pursuant to this subchapter, comply, except as provided in subsection (b) of this section, with such minimum standards of design, construction, alteration, and repair as the Secretary or the Secretary of the Department in which the Coast Guard is operating establishes; and

(3) which is used at any time after the one-year period beginning on the effective date of such regulations for activities pursuant to this subchapter, be manned or crewed, except as provided in subsection (c) of this section, by citizens of the United States or aliens lawfully admitted to the United States for permanent residence.

(b) Exceptions from design, construction, alteration, and repair requirements

The regulations issued under subsection (a)(2) of this section shall not apply to any vessel, rig, platform, or other vehicle or structure built prior to September 18, 1978 until such time after such date as such vehicle or structure is rebuilt.

(c) Exceptions from manning requirements

The regulations issued under subsection (a)(3) of this section shall not apply—

(1) to any vessel, rig, platform, or other vehicle or structure if—

(A) specific contractual provisions or national registry manning requirements in effect on September 18, 1978, provide to the contrary;

(B) there are not a sufficient number of citizens of the United States, or aliens lawfully admitted to the United States for permanent residence, qualified and available for such work; or

(C) the President makes a specific finding, with respect to the particular vessel, rig, platform, or other vehicle or structure, that application would not be consistent with the national interest; and

(2) to any vessel, rig, platform, or other vehicle or structure, over 50 percent of which is owned by citizens of a foreign nation or with respect to which the citizens of a foreign nation have the right effectively to control, except to the extent and to the degree that the President determines that the government of such foreign nation or any of its political subdivisions has implemented, by statute, regulation, policy, or practice, a national manning requirement

for equipment engaged in the exploration, development, or production of oil and gas in its offshore areas.

(Aug. 7, 1953, ch. 345, § 30, added Sept. 18, 1978, Pub. L. 95-372, title II, § 208, 92 Stat. 669.)

APPENDIX F

TITLE 33, C.F.R.

PART 141—PERSONNEL

Subpart A—Restrictions on Employment

§ 141.1 Purpose.

This subpart prescribes rules governing restrictions on the employment of personnel on units engaged in OCS activities.

§ 141.5 Applicability.

(a) This subpart applies to employment of personnel on units engaged in OCS activities, except as provided in paragraph (b) of this section.

(b) This subpart does not apply to employment of personnel on any:

(1) Vessel subject to the citizenship requirements of 46 U.S.C. 672a for pilots, licensed officers, and unlicensed crew when the vessel is transiting to or from an OCS facility or a United States port;

(2) Vessel subject to the citizenship requirements of 46 U.S.C. 1132 for officers and crew on federally subsidized or documented vessels; or

(3) Unit over 50 percent of which is owned by one or more citizens of a foreign nation or with respect to which one or more citizens of a foreign nation have the right effectively to control, except to the extent and to the degree that the President determines that the government of such foreign nation or any of its political subdivisions has implemented, by statute, regulation, policy, or practice, a national manning requirement for equipment engaged in the exploration, development, or production of oil or gas in its offshore areas.

(c) The Commandant may, upon request or upon that person's own initiative, determine whether over 50 percent of a particular unit is owned by citizens of a foreign nation or whether citizens of a foreign nation have the right effectively to control the unit.

(d) In determining whether ownership or a right effectively to control exists, the Commandant may consider operational control of a unit, management responsibility, title, lease and charter arrangements, and financial interests.

(e) The owner or operaor of any unit affected is notified of the Commandant's determination.

(Information collection requirements contained in paragraph (c) were approved by the Office of Management and Budget under OMB control number 2130-0182)

§ 141.10 Definitions.

As used in this subpart:

"Citizens of the United States" means:

(1) In the case of an individual, one who is a native born, derivative, or fully naturalized citizen of the United States;

(2) In the case of a partnership, unincorporated company, or association, one in which 50% or more of the controlling interest is vested in citizens of the United States; or

(3) In the case of a corporation, one which is incorporated under the laws of the United States or of any State thereof.

"Citizen of a foreign nation" means:

(1) In the case of an individual, one who is not a citizen of the United States;

(2) In the case of a partnership, unincorporated company, or association, one in which more than 50% of

the controlling interest is vested in citizens of a nation other than the United States; or

(3) In the case of a corporation, one which is incorporated under the laws of a nation other than the United States so long as (i) the title to a majority of the stock thereof is free from any trust or fiduciary obligation in favor of any citizen of the United States; (ii) the majority of the voting power in the corporation is not vested in any citizen of the United States; (iii) through any contract or understanding, the majority of the voting power may not be exercised directly or indirectly on behalf of any citizen of the United States; or (iv) by no other means, control of the corporation is conferred upon or permitted to be exercised by any citizen of the United States.

"Resident alien" means an alien lawfully admitted to the United States for permanent residence in accordance with section 101(a)(20) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. 1101(a)(20).

§ 141.15 Restrictions on employment.

(a) On or after April 5, 1983, each employer of personnel on any unit engaged in OCS activities that is subject to this part must employ, as members of the regular complement of the unit, only citizens of the United States or resident aliens except as provided by § 141.20.

(b) As used in paragraph (a) of this section, "regular complement of a unit" means those personnel necessary for the routine functioning of the unit, including marine officers and crew; industrial personnel on the unit, such as toolpushers, drillers, roustabouts, floor hands, crane operators, derrickmen, mechanics, motormen, and general maintenance personnel; and support personnel on the unit, such as cooks, stewards and radio operators. The term does not include specialists, professionals, or other technically trained personnel called in to handle emergencies or other temporary operations; extra personnel

on a unit for training; and other personnel temporarily on a unit for specialized operations, such as construction, alteration, well logging, or unusual repairs or emergencies.

(c) The Officer in Charge, Marine Inspection, may determine whether a particular individual or position is part of the regular complement of a unit. A copy of the determination is provided to the owner or operator of the unit affected.

§ 141.20 Exemptions from restrictions on employment.

(a) An employer may request an exemption from the restrictions on employment in § 141.15 in order to employ persons other than citizens of the United States or resident aliens as part of the regular complement of the unit under the following circumstances:

(1) When specific contractual provisions or national registry manning requirements in effect on September 18, 1978 provide that a person other than a citizen of the United States or a resident alien is to be employed on a particular unit.

(2) When there is not a sufficient number of citizens of the United States or resident aliens qualified and available for the work.

(3) When the President determines with respect to a particular unit that the employment of only citizens of the United States or resident aliens is not consistent with the national interest.

(b) The request must be in writing, identify the provision of paragraph (a) of this section relied upon, and:

(1) If involving specific contractual provisions under paragraph (a)(1) of this section, list the persons claimed exempt and contain a copy of the contract;

(2) If involving persons without an H-2 Visa under paragraph (a)(2) of this section, list the persons or positions sought to be exempted; or

(3) If under paragraph (a)(3) of this section, identify the unit involved and contain any information in support of the claim.

(c) Requests must be submitted to the Commandant (G-MVP). U.S. Coast Guard Headquarters, 2100 2nd Street, SW., Washington, D.C. 20593.

(d) Upon receipt of a request under paragraph (a)(2) of this section, the Coast Guard seeks information from the Department of Labor concerning whether there are citizens of the United States or resident aliens qualified and available for work. If information is provided that citizens of the United States or resident aliens are qualified and available, the employer may be required to seek their employment before the request is approved.

(e) Upon receipt of a request under paragraph (a)(3) of this section and after consulting with other Federal agencies as appropriate, the Commandant forwards the request and the comments of the Coast Guard and other interested agencies to the President for determination.

(f) Upon approval by the President for request under paragraph (a)(3) of this section or by the Coast Guard for all other requests, the Coast Guard issues a certification of the exemption. A certification issued under paragraph (a)(2) of this section is valid for one year from the date of issuance.

(g) If, within 30 days of receipt by the Coast Guard of a request under paragraph (a)(2) of this section, the Coast Guard does not make a determination or advise the employer that additional time for consideration is necessary, the request is considered approved for a period of 90 days from the end of the 30 day period.

(h) A request need not be submitted for persons who are not citizens of the United States or resident aliens and who:

(1) Are employed under the national registry manning requirements exception in paragraph (a)(1) of this section; or

(2) Have been classified and admitted to the United States as temporary workers under 8 U.S.C. 1101(a)(15)(H)(ii) for work in a position for which admitted.

APPENDIX G

IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. § 1101 *et seq.*

§ 1182. Excludable aliens

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States:

(1) Health-related grounds.—

(A) In general

Any Alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance,

(ii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior, or

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is excludable.

* * * *

(2) Criminal and related grounds.—

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense), or

(II) a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is excludable.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is excludable.

(C) Controlled substance traffickers

Any alien who the consular or immigration officer knows or has reason to believe is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assister, abettor, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, is excludable.

* * * *

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means,

is excludable.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity, or

(II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity (as defined in clause (iii)),

is excludable. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Terrorist activity defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 116 (b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for more personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iii) Engage in terrorist activity defined

As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist

activity at anytime, including any of the following acts:

(I) The preparation or planning of a terrorist activity.

(II) The gathering of information on potential targets for terrorist activity.

(III) The providing of any type of material support, including a safe house, transportation, communications, funds, false identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is excludable.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry

into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

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